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IN THE
Supreme Court of the United States

IN RE TEXT MESSAGING ANTITRUST LITIGATION

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,
AT&T MOBILITY LLC, SPRINT NEXTEL CORPORATION,
AND T-MOBILE USA,
Petitioners,

v.

JIM MORRIS, ET AL., ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that rival firms in a concentrated industry, while members of the same trade association, engaged in follow-the-leader pricing state a claim under Section 1 of the Sherman Act and this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), without regard to whether the complaint's factual allegations, considered as a whole, make an inference of conspiracy plausible.

2. Whether the Seventh Circuit erred when, contrary to the Federal Rules of Civil Procedure and the accepted and usual course of judicial proceedings in the other circuits, it ruled on petitioners' interlocutory appeal without affording petitioners an opportunity to brief the merits.

PARTIES TO THE PROCEEDINGS

Petitioners Cellco Partnership d/b/a Verizon Wireless, AT&T Mobility LLC, Sprint Nextel Corporation, and T-Mobile USA were the defendants in the district court proceedings and the petitioners in the court of appeals proceedings.

The following parties were listed as the named plaintiffs in the consolidated class-action complaint filed in the Northern District of Illinois and were respondents in the court of appeals proceedings:

Aircraft Check Services Company
Nicholas Iltsopoulos
David Keefer
Kevin Konkel
Jim Morris
Premiere Investment Consulting
Melissa Leigh Randolph
Elizabeth Smith

The following parties were the named plaintiffs in other district court actions that were transferred to, and/or consolidated with other cases already in, the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation ("JPML"), and they are listed on the lead docket for the Northern District of Illinois and/or the JPML's transfer order:

Charles F. Barrett
Gilmore Birch Bernard, II
Tarquin Black
Matthew Brousseau
Rodney Cain
Joseph F. Clark
Tonya Clark
Kim A. Cosgrove

Cuneo-Leider Management & Development Corp.
Tina L. Dillinger
Kathryn Dolatowski
Marie Fernandez
Jeffrey Fine
John Flint
Zac Flores
Carol Fraser
Clifford L. Frisbie
Gregory W. Gilcrease
Katie Hotard
Bert Jacome
Kim Kastel
Kristen Kastel
Mecca Keener
Kenny Knight
Lourdes Leslie
Luis A. Maldonado-Mercado
Julian Marshall
Michelle McClain
Laurie McLaughlin
Susan Orians
Rita Polk
Melanie Polk-Stamps
James Reaster
Mark Reinhart
Jennifer Reynhout
Jeffrey Robb
Andee Roussel
Vaughanzella Smith-Howard
Deborah L. Sparks
Michael Steadman
Christiane Trujillo
Brandon Weaver
Bonnie Williams
Debra Woodbury

Quin Jackson and David Whitworth were the named plaintiffs in a class-action lawsuit filed in the District of Kansas that, after being transferred to the Northern District of Illinois by the JPML, was later remanded to the District of Kansas.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Cellco Partnership d/b/a Verizon Wireless, AT&T Mobility LLC, Sprint Nextel Corporation, and T-Mobile USA state the following:

Cellco Partnership d/b/a Verizon Wireless, a general partnership formed under the law of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55% and 45% partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

AT&T Mobility LLC is a wholly owned subsidiary of AT&T Inc. AT&T Inc. is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

Sprint Nextel Corporation is a publicly held company that has no parent company, and no publicly held company owns 10% or more of its stock.

T-Mobile USA is a wholly owned subsidiary of T-Mobile Global Holding GmbH, a German entity, which in turn is a wholly owned subsidiary of T-Mobile Global Zwischenholding GmbH, a German entity. T-Mobile Global Zwischenholding GmbH is a wholly owned subsidiary of Deutsche Telekom AG, a German entity. Deutsche Telekom AG is a publicly traded company in that the American Depository Receipts of Deutsche Telekom AG are publicly traded in the Over-the-Counter Market in the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENTS v

TABLE OF AUTHORITIES ix

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 4

1. The Wireless Communications Industry 4
2. Text Messaging 6
3. The Complaints and the District Court Opinions 7
4. Certification and Appeal 11
5. The Opinion Below 12

REASONS FOR GRANTING THE PETITION 14

I. THE LOWER COURT FAILED TO REQUIRE FACTUAL ALLEGATIONS RAISING A PLAUSIBLE INFERENCE OF CONSPIRACY, IN CONFLICT WITH DECISIONS OF THIS COURT AND LOWER COURTS 14

   A. The Seventh Circuit's Determination That the Complaint's Allegations Satisfy Rule 8 Conflicts with *Twombly* and *Iqbal* 14

B. The Seventh Circuit's Decision Conflicts with the Sixth Circuit's Decision in *Travel Agents* and Other Circuit Court Decisions 21

C. The Importance of the Question Presented Warrants Review 23

II. THE LOWER COURT'S REFUSAL TO ALLOW BRIEFING ON THE MERITS IMPERMISSIBLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 25

CONCLUSION 29

APPENDIX:

Opinion of the United States Court of Appeals for the Seventh Circuit, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (Dec. 29, 2010) 1a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (Apr. 30, 2010) 13a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (Dec. 10, 2009) 21a

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (Jan. 26, 2011) 44a

Amended Consolidated Class Action Complaint, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (N.D. Ill. filed Oct. 16, 2009) 45a

Second Amended Consolidated Class Action Complaint, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (N.D. Ill. filed May 4, 2010) 76a

Petition for Interlocutory Appeal, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (7th Cir. filed Nov. 2, 2010) (excerpt) 112a

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)....... 14, 15, 20

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 1, 2, 13, 14, 15, 17, 18, 19, 20, 22, 25

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000).. 15

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 23

Citric Acid Litig., In re, 191 F.3d 1090 (9th Cir. 1999).. 16

Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988).............................. 17

Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805 (7th Cir. 2010) 28

EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005).. 29

EEOC v. Sidley Austin LLP, 437 F.3d 695 (7th Cir. 2006).. 29

Elevator Antitrust Litig., In re, 502 F.3d 47 (2d Cir. 2007) 23

First Bank v. DJL Props., LLC, 598 F.3d 915 (7th Cir.), *cert. denied*, 131 S. Ct. 506 (2010) 28

High Fructose Corn Syrup Antitrust Litig., In re, 361 F.3d 439 (7th Cir. 2004) 29

Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001).. 29

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008) 22, 23

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001) 28

Pella Corp. v. Saltzman, 606 F.3d 391 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 998 (2011) 28

Reiser v. Residential Funding Corp., 380 F.3d 1027 (7th Cir. 2004) 29

Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37 (7th Cir. 1992) 16

Sprint Nextel Corp., In re, 593 F.3d 669 (7th Cir. 2010) 28

Travel Agent Commission Antitrust Litig., In re, 583 F.3d 896 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 896 (2011) 21, 22

Wallace v. Louisiana Citizens Prop. Ins. Corp., 444 F.3d 697 (5th Cir. 2006) 28

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) 14, 15

ADMINISTRATIVE DECISIONS

Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd 11407 (2010) 4, 5, 6, 7

Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 19 FCC Rcd 20597 (2004) 4

STATUTES AND RULES

Sherman Act, § 1, 15 U.S.C. § 1 .... 3, 14, 15, 17, 23, 24

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1292(b) 2, 3, 11, 12, 14, 26, 27, 28, 29

47 U.S.C. § 332(c)(1)(C) 4

Sup. Ct. R. 10(a) 25, 29

Fed. R. App. P.:

Rule 2 27

Rule 5 26

Rule 5(b)(1)(A)-(D) 26

Rule 5(c) 12, 26

Rule 5(d)(2) 26

Rule 31 26

Rule 31(a)(1) 25, 26

Rule 32 26

Rule 32(a)(7)(B) 26

Rule 32(e) 26

Rule 34(a)(2) 26

Fed. R. Civ. P. 8 14

LEGISLATIVE MATERIALS

Letter from Sen. Herb Kohl to Hon. Christine Varney, Ass't Attorney General, Antitrust Division, U.S. Dep't of Justice, and Hon. Julius Genachowski, Chairman, FCC (July 6, 2009) 8

Letter from Sen. Herb Kohl to Lowell McAdam, President & CEO, Verizon Wireless, et al. (Sept. 9, 2008), *available at* http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=1920 .... 7, 8

OTHER MATERIALS

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Adam M. Brandenburger & Barry J. Nalebuff, *Co-opetition Interactive*, http://mayet.som.yale.edu/coopetition/ (last visited Mar. 22, 2011) 19

Oral Argument Tr., *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (Nov. 27, 2006), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1126.pdf 24

Richard A. Posner, *Antitrust Law* (2d ed. 2001) 24

Amy Schatz & Thomas Catan, *Justice Ends Probe of Texting Rates*, Wall St. J., Jan. 15, 2010, at B6 8

16A Charles Alan Wright et al., *Federal Practice and Procedure* (4th ed. 2008) 27

Cellco Partnership d/b/a Verizon Wireless, AT&T Mobility LLC, Sprint Nextel Corporation, and T-Mobile USA respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

Plaintiffs, representing a purported class, claim that defendants fixed the price of single-use text messages, that is, the price consumers pay to send a single text message when that service is not already included in the price of their service plan. Plaintiffs seek to subject defendants to wide-ranging and costly discovery by claiming that the existence of an agreement can be inferred from allegations that (1) companies in a concentrated industry raised prices, sequentially, by the same amount; (2) the price increases were not justified by increased costs; and (3) defendants participated in a trade association.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), establishes that such allegations are insufficient to state a claim because they fail to "plausibly suggest[] . . . agreement" rather than "conduct that could just as well be independent action." *Id.* at 557. The Seventh Circuit, however, per Judge Posner, did not agree, holding that the complaint's allegations of "parallel behaviors, details of industry structure, and industry practices, that facilitate collusion," were sufficient. App. 8a. Quoting *Twombly*, the court stated that the complaint's allegations amounted to "'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason,'" and thus "'support[ed] a plausible inference of conspiracy.'" App. 10a-11a (quoting *Twombly*, 550 U.S. at 556 n.4).

The court's determination that the complaint's allegations state a claim conflicts with *Twombly* and with the decisions of other courts of appeals. The price increases alleged in the complaint were spread over six to eleven months. The complaint alleged that prices of wireless services generally fell during the period of the alleged conspiracy, and the complaint also acknowledged that each defendant had a unilateral incentive to raise the single-use text messaging fee in order to make the purchase of *bundles* of text messages more attractive. The Seventh Circuit's holding suggests that any claim of parallel pricing in a concentrated industry may survive a motion to dismiss so long as a plaintiff asserts that price changes were made "at the very same time," for no reason other than prior agreement, and in the sinister shadow of trade association membership – irrespective of whether the underlying facts actually alleged in the complaint supported those assertions or made them plausible. That approach flattens the pleading hurdle that *Twombly* established.

Review also is warranted because the Seventh Circuit decided the case without affording defendants any opportunity to address the merits of the question presented to the court of appeals. This case went before the court on a petition for leave to appeal under 28 U.S.C. § 1292(b); the court granted the petition and proceeded in the same opinion to decide the issue presented without hearing from the parties on the merits. That practice – almost unique to the Seventh Circuit – is at odds with the Federal Rules of Appellate Procedure and unjustified by any consideration of sound judicial administration. Unless this Court addresses and disapproves of the practice, the Seventh Circuit will continue to disregard the procedural rights of litigants who seek interlocutory review.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is reported at 630 F.3d 622. The memorandum opinion and order of the district court granting plaintiffs leave to file the second amended complaint (App. 13a-20a) is not reported (but is available at 2010 WL 1782006). The memorandum opinion and order of the district court granting defendants' motion to dismiss the first amended complaint (App. 21a-43a) is not reported.

JURISDICTION

The court of appeals entered its judgment on December 29, 2010, and denied a petition for rehearing on January 26, 2011 (App. 44a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 1292(b) of Title 28 provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

> termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

STATEMENT

1. The Wireless Communications Industry

The Federal Communications Commission ("FCC") licensed radio spectrum for cellular telephone service in 1981; since that time, the wireless communications industry has grown exponentially. With increased allocation of spectrum to wireless services and advances in wireless communications technology, consumption of wireless services has soared and the price of service has plunged.[1] In 1994, there were fewer than 25 million wireless subscribers, using an average of 119 minutes of voice service each month.[2] By 2008, there were 270 million wireless subscribers, using more than 700 minutes of voice service each month.[3] In 1994, the average revenue per minute of voice service – a common measure of price – was $0.47; by 2008, it had fallen to $0.05.[4] Wireless service in the United States is significantly cheaper than in most developed countries: for example, revenue per minute in Canada is nearly twice as high as in the United States; in France it is nearly three times higher, and in Japan five times higher. Output, too, is much higher in the United States than in foreign markets.[5]

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[1] In 1993, Congress ordered the FCC to "review competitive market conditions with respect to commercial mobile services" and to prepare an "annual report" containing its "analysis of those conditions." 47 U.S.C. § 332(c)(1)(C). Those reports contain extensive data tracking the growth of the wireless industry in the United States over nearly two decades. The latest report was issued in May 2010. *See* Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd 11407 (2010) ("*14th Competition Report*").

[2] *See* Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 19 FCC Rcd 20597, App. A, Tables 1 & 9 (2004).

The marketplace for wireless services is characterized by substantial competition. In 2009, more than 90 percent of Americans had a choice among at least four providers of wireless communications service; more than 70 percent of Americans could choose among five or more.[6] Subscriber churn – the rate at which subscribers switch among carriers – has remained high.[7] The industry-wide average churn is more than 2 percent per month – which means that each carrier loses, on average, one-quarter of its subscribers to a competitor each year. As the FCC concluded, "[d]uring 2008 and 2009, mobile wireless service providers continued to compete on the basis of pricing plans as well as on various non-price factors, such as network upgrades; product information and perception . . . ; and downstream product differentiation, which includes handset/device and application offerings."[8]

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[3] *14th Competition Report* ¶ 156 & Table 14; *id.* ¶ 176 & Chart 21.

[4] *See id.* ¶¶ 188, 190.

[5] *See id.* ¶ 361 & Table 40.

[6] *See id.* ¶ 46 & Table 6.

[7] *See id.* ¶ 248.

2. Text Messaging

Wireless service providers offer both voice and data services. The use of data services – web browsing; e-mail; video and television; text, picture, and video messaging; and GPS navigation – has risen rapidly. Revenues from data services accounted for less than 1 percent of industry revenues as recently as 2001; by 2008, data services accounted for nearly one-quarter of industry revenues.[9]

The most popular data service is text messaging, and use of that service, too, has expanded dramatically. According to the FCC, the number of text messages sent by consumers doubled from 2005 to 2006, doubled again in 2007, and nearly tripled in 2008.[10] United States consumers sent an estimated 1 trillion text messages in 2008, and that volume continues to grow.

At the same time, the price of text messaging has fallen sharply. The overwhelming majority of text messages are sent by consumers who do not pay for text messaging on a single-message basis, but who purchase a service package, *i.e.*, a bundle of both voice and data wireless services. *See* App. 88a-89a (¶¶ 60-61). These packages typically allow the user to send and receive hundreds of text messages – or an unlimited number – for a flat monthly fee. *See* App. 89a (¶ 62).

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[8] *Id.* ¶ 86.

[9] *See id.* ¶ 202 & Table 19.

[10] *See id.*, Table 20.

The FCC estimated that providers' revenues on a per-text-message basis declined by 70 percent between 2005 (when the average revenue per text message was $0.037) and 2008 (when the average revenue per text message was $0.011). The FCC indicated that this decrease was "likely the result of customers purchasing bucket or unlimited texting plans rather than paying for texting on a per-use basis. In such cases, the marginal price of sending an additional text message is nearly zero, and usage has increased dramatically."[11]

3. The Complaints and the District Court Opinions

a. On September 9, 2008, the Chairman of the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights sent a letter to the chief executive officers of the four national wireless service providers – petitioners here – "to express . . . concern regarding what appear to be sharply rising rates . . . for text messaging." Letter from Sen. Herb Kohl to Lowell McAdam, President & CEO, Verizon Wireless, et al. (Sept. 9, 2008), *available at* http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=1920. The letter claimed that text messages were "commonly priced at 10 cents per message" in 2005; that Sprint was the "first carrier to increase the text message rate to 20 cents" in the fall of 2007; and that a year later, by the end of September 2008, "all of [Sprint's] three main competitors" would have "matched this price increase." *Id.* The letter stated that "[t]his conduct is hardly consistent with the vigorous price competition we hope to see in a competitive marketplace." *Id.*[12]

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[11] *Id.* ¶ 192.

The next day, a complaint was filed on behalf of a purported class of persons "who purchased text messaging services from defendants at any time from January 1, 2005 to the present." Class Action Compl. at 1, *Cuneo-Leider Mgmt. & Dev. Corp. v. Verizon Wireless*, No. 3:08-cv-04621 (D.N.J. filed Sept. 10, 2008). Within weeks, 38 complaints were filed. After the Judicial Panel on Multidistrict Litigation transferred all the cases to the Northern District of Illinois, plaintiffs filed a consolidated complaint accusing defendants of engaging in a conspiracy to fix prices for text messaging services. Plaintiffs' first consolidated complaint recited that defendants "engaged in a contract, combination and conspiracy to artificially raise, fix, maintain and/or stabilize pricing for Text Messaging Services," beginning "at least as early as January 1, 2005 (the exact date being unknown to Plaintiffs)." Consol. Class Action Compl. ¶ 126 ("CCAC") (filed Apr. 29, 2009) (Dkt. Entry 63); *see* App. 70a (Am. Consol. Class Action Compl. ¶ 132 ("FAC")). Despite the reference to "Text Messaging

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[12] After hearings, Senator Kohl wrote that "[t]he cell phone companies testified that they did not coordinate their price increases in any way, and we received no evidence to contradict this testimony." Letter from Sen. Herb Kohl to Hon. Christine Varney, Ass't Attorney General, Antitrust Division, U.S. Dep't of Justice, and Hon. Julius Genachowski, Chairman, FCC, at 1 (July 6, 2009) (attached as Exh. 1 to Defs.' Reply Memo. in Support of Their Mot. To Dismiss (filed Aug. 25, 2009) (Dkt. Entry 106)). In addition, the *Wall Street Journal* reported that the Department of Justice initiated an investigation into carriers' text messaging rates at the request of Senator Kohl and that "it has concluded [its] inquiry . . . and has no plans to take action on this issue." Amy Schatz & Thomas Catan, *Justice Ends Probe of Texting Rates*, Wall St. J., Jan. 15, 2010, at B6.

Services" – defined in the complaint to include any "use of a cellular telephone to send a character message," CCAC ¶ 11; *see* App. 48a-49a (FAC ¶ 14) – the complaint made clear that the alleged conspiracy involves only one pricing option for text messaging service, *i.e.*, text messages that are priced on a *single-use* basis.

The principal basis for plaintiffs' conspiracy claim was the allegation that defendants increased the single-message price for text messaging by the same amount within six to eleven months of one another. Specifically, plaintiffs claimed that Sprint increased the price of a single text message in the fourth quarter of 2006 from $0.10 to $0.15; that AT&T and Verizon Wireless (in that order) followed in the first quarter of 2007; and that T-Mobile followed in the second quarter of 2007. Plaintiffs also alleged that Sprint increased the single-use fee from $0.15 to $0.20 in the fourth quarter of 2007; that Verizon Wireless and AT&T (in that order) followed in the first quarter of 2008; and that T-Mobile followed in the third quarter of 2008. *See* App. 58a-59a (FAC ¶¶ 73-76); *see also* App. 92a-93a (Second Am. Consol. Class Action Compl. ¶¶ 82-85 ("SAC")).

Plaintiffs also alleged (1) that increases in the single-message price for text messaging exceeded any increase in the cost of providing the service;[13] (2) that a concentrated industry structure favors collusion;[14] (3) that defendants belonged to a trade association, which afforded them opportunities to conspire;[15] and (4) that a Senate subcommittee had expressed an interest in the issue.

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[13] *See* App. 57a-58a (FAC ¶¶ 66-72); *see also* App. 90a-91a (SAC ¶¶ 70-74).

[14] *See* App. 68a-69a (FAC ¶¶ 123-126); *see also* App. 104a (SAC ¶¶ 138-141).

b. The district court granted defendants' motion to dismiss. It noted that plaintiffs "do not allege in their complaint that there was an express agreement among the defendants," App. 30a, and that, even assuming that the pattern of price changes alleged constituted "parallel conduct," plaintiffs had failed to plead sufficient facts to support an inference that the increases were the result of a prior agreement, App. 36a-38a, 43a.

c. Plaintiffs moved for leave to file a second amended complaint on January 8, 2010. The SAC differed in only insignificant respects from its predecessors. Plaintiffs argued that the proposed amendment clarified that the alleged conspiracy began at some unspecified date when all of the defendants agreed to converge on $0.10 per single text message price – that is, prior to the later price increase from $0.10 to $0.15 per single text message.[16] Plaintiffs also added further allegations related to statements and activities of CTIA, a trade association, and the "Wireless Internet Caucus," a working group that included at least 40 companies not providing text messaging services.[17]

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[15] *See* App. 64a (FAC ¶ 100); *see also* App. 99a (SAC ¶ 112) ("During the variety of [trade association] meetings and conversations, Defendants had numerous opportunities to conspire to set pricing for Text Messaging Services.").

[16] According to the SAC, AT&T independently set a single-use text messaging fee of $0.10 before the conspiracy began; Sprint-Nextel adopted the same price – also unilaterally – in early 2005. *See* App. 91a-92a (¶¶ 78, 79). The complaint alleges that "T-Mobile, Alltel, and Verizon joined them in charging an identical ten cents per-unit for all incoming and outgoing messages" pursuant to agreement. *See* App. 92a (¶ 80). According to the complaint, T-Mobile adopted a fee of $0.10 in April 2006, *see* App. 91a (¶ 75); Alltel (which was later acquired by Verizon) "changed its per-unit pricing on several occasions . . . finally reaching the ten cent agreed price in October 2006," *id.* (¶ 76); Verizon allegedly began charging a fee of $0.10 for all

d. The district court granted plaintiffs' motion for leave to file the SAC over defendants' objection that the amendment was futile. It held that plaintiffs' "allegation that in 2005-06, the defendants 'agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services'" constituted an adequate "allegation of an express agreement." App. 16a.[18] It further ruled that other allegations from the SAC "provide[d] additional support . . . that carries plaintiffs over the plausibility threshold," citing in particular allegations related to the trade association to which defendants belonged and "allegations that the defendants exchanged pricing information" at trade group meetings. App. 17a-18a.

4. Certification and Appeal

a. Defendants promptly moved to certify the district court's decision for appeal pursuant to 28 U.S.C. § 1292(b). While that motion was being briefed, plaintiffs served initial discovery on defendants that inquired broadly into defendants' pricing strategies and trade association activities over a 10-year period.

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incoming and outgoing messages "towards the end of 2006," *id.* (¶ 77).

[17] *See* App. 95a-99a (SAC ¶¶ 93-112).

[18] The court "confesse[d] that it mistakenly did not see things that way when it reviewed the prior version of the complaint" but also stated that it "ha[d] not wavered from its view that the earlier version of the complaint was insufficient to state a claim." App. 16a.

When the scope of the discovery was brought to the district court's attention, it stayed discovery; it later certified for immediate appeal its order granting plaintiffs' motion for leave to file the second amended complaint. *See* Order (July 2, 2010) (Dkt. Entry 193); Order (Oct. 25, 2010) (Dkt. Entry 215); App. 1a-2a.

b. Within the 10-day statutory period, defendants filed their petition for leave to appeal. The petition – limited to 20 pages under the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 5(c) – did not argue the merits. Approximately four pages of the brief explained why the district court's opinion was contestable, *see* 28 U.S.C. § 1292(b), emphasizing the insignificance of any differences between the complaint that the district court had dismissed and the amended complaint. Plaintiffs opposed the motion. Defendants filed a motion for leave to file a proffered reply, which the court of appeals denied.

5. The Opinion Below

The Seventh Circuit granted defendants' petition for leave to appeal. In the same order, the court of appeals affirmed the decision of the district court without allowing defendants to brief the merits.

In taking jurisdiction, the court reasoned that "*Twombly* is a recent decision, and its scope unsettled"; that "[p]leading standards in federal litigation are in ferment"; and that "the relation of *Twombly* to the standards for interlocutory appeals . . . is a further novelty" that justified the assertion of interlocutory jurisdiction. App. 6a-7a. In the next paragraph, the court asserted that "the merits of the appeal have been fully briefed in the parties' submissions and would not, we think, be illuminated by oral argument," and it proceeded to decide those merits. App. 7a.

The court characterized the SAC as alleging a "mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion." App. 8a.[19] It said that the SAC alleged "that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third," App. 10a; "that the defendants belonged to a trade association and exchanged price information directly at association meetings" and that the Wireless Internet Caucus Leadership Council's ("WIC Leadership Council") "stated mission was to urge its members to substitute 'co-opetition' for competition"; and "that in the face of steeply falling costs, the defendants increased their prices." App. 9a-10a.

Based on these characterizations, the court of appeals affirmed, holding that plaintiffs had alleged "'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason'" than collusion, which could "'support a plausible inference of conspiracy.'" App. 10a-11a (quoting *Twombly*, 550 U.S. at 556 n.4) (further internal quotation marks omitted).

The court of appeals denied a timely petition for rehearing and rehearing en banc. *See* App. 44a.

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[19] The Seventh Circuit thus indicated that it did not agree with the district court that the complaint contained direct allegations of agreement.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and reverse for two reasons. First, the Seventh Circuit's determination that plaintiffs' complaint passes muster under *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), conflicts with this Court's decisions and the decisions of other courts of appeals, and means that virtually any complaint alleging price fixing in a concentrated industry will proceed to discovery in the Seventh Circuit. Second, the Seventh Circuit's resolution of petitioners' appeal without allowing briefing on the merits was inconsistent with the Federal Rules of Appellate Procedure. The Seventh Circuit's repeated but sporadic practice of denying litigants the right to brief the merits of interlocutory appeals conflicts with the unvarying practice of virtually every other circuit court and undermines the procedural right granted by Congress in § 1292(b).

I. THE LOWER COURT FAILED TO REQUIRE FACTUAL ALLEGATIONS RAISING A PLAUSIBLE INFERENCE OF CONSPIRACY, IN CONFLICT WITH DECISIONS OF THIS COURT AND LOWER COURTS

A. The Seventh Circuit's Determination That the Complaint's Allegations Satisfy Rule 8 Conflicts with *Twombly* and *Iqbal*

1. A plaintiff alleging a violation of Section 1 of the Sherman Act must, at the pleading stage, allege facts "plausibly suggesting (not merely consistent with) agreement." *Twombly*, 550 U.S. at 557. That requirement reflects the recognition that "proceeding to antitrust discovery can be expensive." *Id.* at 558. Here, as in *Twombly* itself, "[t]hat potential expense is obvious enough." *Id.* at 559. Because of practical limits on district courts' ability to control discovery expense, "it is only by taking care to require alle-

gations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Id.* (internal quotation marks and brackets omitted).

The pleading standard established in *Twombly* and reconfirmed in *Iqbal* is not satisfied unless a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Where a plaintiff seeks to rest a Section 1 claim on "descriptions of parallel conduct," a complaint's "sufficiency turns on the suggestions raised by th[e] conduct when viewed in light of common economic experience." *Twombly*, 550 U.S. at 564-65.

2. The allegations of the SAC fall short. The sequential price changes alleged in the complaint – which were completed over the space of months or years – do not point to any prior coordination. Each of the petitioners allegedly arrived at a 10-cent per-message fee by various paths and at different times over the course of years. In the fourth quarter of 2006, Sprint allegedly announced an increase to 15 cents; months later, AT&T and Verizon followed; months after that, T-Mobile also adopted a 15-cent charge. The increase to 20 cents followed a similar pattern, with the increases spread over nearly a year. Such sequential price changes do not support an inference of prior agreement. *See, e.g.*, *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) ("evidence of conscious parallelism [alone] does not permit an inference of conspiracy") (internal quotation marks omitted; alteration in original); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000) (en banc); *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50-51 (7th Cir. 1992).

The allegation that the alleged price increases at issue were not justified by increases in the cost of individual text messages does not render this allegation any more suggestive. Even ignoring context, the claim that rivals in an allegedly concentrated industry raised prices above cost does not suggest conspiracy: interdependent pricing is characteristic of such markets. *See, e.g.*, *Williamson Oil*, 346 F.3d at 1299; 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1429b, at 222 (3d ed. 2010) ("'oligopolistic rationality' cannot only forestall rivalrous price reductions, it can also provide for price increases").

Further, in the context of this complaint, the allegation does not even indicate that defendants were pricing their *services* above cost. The marginal cost of a single text message may be close to zero – but no consumer ever buys a single text message in isolation. Defendants offer text messaging services under a variety of pricing plans as one feature of wireless service. The complaint alleges that the price of wireless service as a whole *declined* during the class period, and it alleges nothing about the price of text messaging sold in bundles. In industries with high fixed costs – and the wireless industry is one – companies must charge prices that exceed marginal costs; otherwise, they will be unable to recover their fixed costs and will fail. *See* William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 Antitrust L.J. 661, 665 (2003). Such firms are impelled by competition to find efficient pricing structures that recover fixed costs differently from different services and customers depending on customers' demand characteristics and price sensitivities. Increasing the price of single-use text messages to wireless customers may be an imperative if it allows a competitor to reduce prices for other services that customers care more about.

As for defendants' alleged membership in a trade association, the SAC lacked any allegation that trade group activities were instrumental in the formation or implementation of any conspiracy; nor did the complaint identify any alleged public statements in the trade-group context betraying the existence of any unlawful agreement. Specific statements quoted in the complaint were attributed to industry experts or trade association officials – not defendants – and were made in 2002 and 2003, years before the conspiracy allegedly began. Moreover, those statements related to the adoption of common technical standards, a pro-competitive process that requires cooperation among rivals. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487 (1st Cir. 1988) (Breyer, J.).

3. The Seventh Circuit's decision treats the existence of parallel pricing in a concentrated industry, accompanied by trade association activity, as sufficient to state a claim under Section 1 of the Sherman Act without regard to whether the complaint's factual allegations, considered as a whole and with proper attention to context, make the inference of conspiracy plausible. That holding cannot be squared with *Twombly*.

First: to the extent the Seventh Circuit's decision rests on the allegation that "four defendants sell 90 percent of U.S. text messaging services" and that "it would not be difficult for such a small group to agree," App. 9a, the lower court ignored the requirement that a complaint must "plausibly suggest[]" and "not merely [be] consistent with" agreement, *Twombly*, 550 U.S. at 557. The court suggested that an alleged conspiracy among "thousands of children who set up makeshift lemonade stands" would be "utterly implausible," App. 9a, but "*utter*" implausibility is not the standard *Twombly* establishes. Rather, the context must "raise[] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. Because sequential price changes in an allegedly concentrated industry "could just as well be" the predictable effect of interdependence, industry structure alone does not allow a plaintiff alleging sequential price changes to state a claim. *See supra* pp. 15-16.

Second: the Seventh Circuit's observation that defendants "belonged to a trade association and exchanged price information directly at association meetings," App. 9a, is indistinguishable from the allegations that this Court found insufficient in *Twombly*. *See* 550 U.S. at 567 n.12. Nothing in the complaint alleges that the price of single-use text messages was ever discussed at any trade association meeting; much less is this a case where any alleged "practice" facilitated price fixing in a manner "difficult for the authorities to detect." App. 9a. All of the price changes alleged in the complaint were publicly announced. *See* App. 79a (SAC ¶ 10) ("Defendants' current per-unit text message prices are . . . available on the Internet."). The complaint does not identify any information pertinent to the alleged conspiracy that was "exchanged" at the trade association.[20]

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[20] The court also recited that "[t]he complaint . . . alleges that the defendants, along with two other large sellers of text mes-

Twombly compared a similar claim that mere membership in a trade association supported an inference of antitrust conspiracy with forcing "Adam Smith['s] . . . famous pinmaker" to engage in costly legal defense "just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag." 550 U.S. at 567 n.12. Indeed, the inference here is even weaker: defendants' "trade guild" included not just "pinmaker[s]" but tailors, seamstresses, and textile vendors. *Id.*; *see* SAC Mem. Exh. C (Dkt. Entry 133-4) (noting participation of 15 non-carrier representatives in WIC Leadership Council); *id.*, Exh. D (Dkt. Entry 133-5)

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saging services, constituted and met with each other in an elite 'leadership council'" with the "stated mission . . . to substitute 'co-opetition' for competition." App. 9a. The court was apparently referring to allegations regarding the WIC Leadership Council and a statement made by a trade group official in 2002. The complaint did not refer to the council as "elite"; in fact (as revealed by attachments to the complaint itself), the group included not only wireless service providers but also software developers, equipment vendors, and others. As for the reference to "co-opetition" – which the court appeared to consider sinister – the source cited for the term by CTIA is the work of a business professor who elsewhere defines "co-opetition" as "cooperating to create a bigger business 'pie,' *while competing to divide it up*." Adam M. Brandenburger & Barry J. Nalebuff, *Co-opetition Interactive,* http://mayet.som.yale.edu/coopetition/ (emphasis added) (last visited Mar. 22, 2011); *see* Mem. in Support of Pls.' Mot. for Leave To File a Second Am. Consol. Class Action Compl. and Conduct Limited Discovery, Exh. E at 2 (filed Jan. 8, 2010) ("SAC Mem.") (Dkt. Entry 133-6) (attributing the term to Prof. Brandenburger). In this instance, as the complaint makes clear, what was being discussed was the development of standards for the transmission of messages among various wireless networks. There is no allegation that such cooperation – which is essential to the development of interconnection standards and which plainly provides substantial consumer benefit – is improper.

(noting expansion of WIC Leadership Council to include additional non-carrier participants).

Third: the court's determination that the nature and timing of the alleged changes in pricing "is the kind of 'parallel plus' behavior" (App. 11a) that satisfies a conspiracy-plaintiff's burden under *Twombly* misreads this Court's decision. As this Court explained, competitors' price changes may support an inference of conspiracy when they reflect "behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding." 550 U.S. at 556 n.4 (internal quotation marks omitted). In this case, the alleged changes in pricing were spread over many months (in the case of the alleged 5-cent increases in 2006-2008) or years (in the case of the defendants' alleged arrival at the 10-cent rate). Such seriatim changes in price are not suggestive of prior agreement. *See* 6 Areeda & Hovenkamp, *Antirust Law* ¶ 1425d1, at 188 ("agreement is ordinarily more difficult to infer from sequential actions"). And to credit the complaint's "suggest[ion]" that such pricing changes can be characterized as having been made "all at once" or as "so rapid . . . that [they] could not have been accomplished without agreement," App. 10a, is to accept as "truth" mere "conclusions" unsupported by "factual allegations," *Iqbal*, 129 S. Ct. at 1950, contrary to this Court's repeated warning.

Fourth: the Seventh Circuit's indication that "no other discernible reason" existed for the alleged change in the fee for single-use text messages, App. 10a, ignored the allegation in the complaint itself that defendants each had a *unilateral* interest in raising that particular fee in order to make the purchase of bundles – that is, the ability to send hundreds or thousands of text messages each month for a set price – relatively more attractive. *See* App. 103a (SAC ¶ 133). As noted above, in an industry with high fixed costs, rivals will copy a pricing structure that allows the setter to raise prices for the services as to which customers are least price sensitive while constraining or reducing prices for other services. The Seventh Circuit failed even to consider that alternative explanation for the observed price of individual text messages.

B. The Seventh Circuit's Decision Conflicts with the Sixth Circuit's Decision in *Travel Agents* and Other Circuit Court Decisions

1. Review also is warranted because the lower court's opinion conflicts with *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009) ("*Travel Agents*"), *cert. denied*, 131 S. Ct. 896 (2011). That case, like this one, involved allegations of "[c]onscious parallelism" in the pricing behavior of a concentrated industry: identical cuts that numerous airlines made in commissions for travel agents. *Id.* at 903; *see id.* at 898-900. Most cuts took place within weeks, with one airline a few months behind. *See id.* at 899. Further, the plaintiffs in *Travel Agents* relied heavily on "meetings where defendants had an opportunity to conspire" at trade associations, *id.* at 900, and on statements by an industry executive that "'industry consensus' on new commission levels was necessary for the commission cuts and caps to hold" and that "'he had to match commission cuts exactly or he would undercut the movement.'" *Id.* at 909.

The Sixth Circuit upheld dismissal of the complaint for failure to state a claim. The price shifts were "just as likely . . . [to be] an effort [by the price leader] to reduce its internal commission costs, with the ancillary hope that its competitors would follow its lead," as to reflect an agreement. *Id.* at 910. "[G]ather[ings] at industry trade association meetings" over a multi-year period "should not weigh heavily in favor of suspecting collusion." *Id.* at 910-11. And the executive's statements, considered "in [their] entirety," did not "raise a reasonable expectation that discovery would reveal evidence of an illegal agreement." *Id.* at 909.

The Sixth Circuit's holding is inconsistent with the Seventh Circuit's in this case because the allegations in *Travel Agents* were stronger than those before the court below: the time lags were shorter, the discussion of trade association meetings more detailed, and the testimony of the executive more suggestive of agreement than the out-of-context quotations in this case. The divergent outcome of the two cases reflects confusion regarding the application of *Twombly* and *Iqbal* and will confound district courts.

2. The Seventh Circuit's decision also is at odds with the decision of the Ninth Circuit in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047-48 (9th Cir. 2008), and of the Second Circuit in *In re Elevator Antitrust Litigation*, 502 F.3d 47, 51 (2d Cir. 2007).

In *Kendall*, the defendant banks allegedly participated in consortiums of banks issuing MasterCard and Visa credit cards. The allegation was that each bank had agreed to charge merchants the same minimum "discount fee" in connection with credit card transactions. 518 F.3d at 1048. The Ninth Circuit affirmed the district court's judgment of dismissal, noting that "merely charging, adopting or following the fees set by a Consortium is insufficient . . . to constitute a violation of Section 1," and, in the absence of any concrete factual allegation to support the claim that defendants agreed (rather than acting unilaterally), such conduct could not state a claim. *Id.* The Seventh Circuit's decision points to a different result: based on the logic it applied here, the Seventh Circuit could well have found that participation by some of the defendants in the consortiums would "facilitate[] price fixing" in a manner "difficult for the authorities to detect." App. 9a.

In *In re Elevator*, the plaintiffs alleged that the defendants conspired to fix prices for sale and maintenance of elevators. 502 F.3d at 49. The complaint alleged that similarities in "contractual language, pricing, and equipment design" supported an inference that the four elevator manufacturer defendants had reached agreement. The Second Circuit disagreed, noting that "[s]imilar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy; and similar equipment design can reflect the state of the art." *Id.* at 51. Had the Seventh Circuit applied the same analysis, it would have ordered dismissal of the complaint here: the allegedly parallel pricing conduct alleged below was easily explained as reflecting market conditions, efficient pricing structures, or (at worst) interdependent pricing that is lawful under the Sherman Act. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

C. The Importance of the Question Presented Warrants Review

Review is especially warranted in this case because the pattern of allegations – sequential price increases in a concentrated industry – is ubiquitous. The Seventh Circuit relied on allegations (1) that defendants in a concentrated industry arrived at uniform pricing for the same service and then adopted the same price increases in sequence; (2) that the price increases were above cost; and (3) that defendants belonged to a trade association. But such allegations can be made about companies in virtually any concentrated industry. If such allegations state a claim, "then that's the economy" and "you can go sue half the firms in this economy. Every firm in a concentrated industry engages in . . . conscious parallelism." Oral Argument Tr. at 32, *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (Nov. 27, 2006) (question of Breyer, J.), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1126.pdf.

The decision below invites this Court's careful scrutiny for another practical reason: though gravely mistaken, it will likely be influential if allowed to stand. The author of the opinion, who has for many years been reputed to be the most cited of federal appellate court judges, is also an antitrust scholar.[21]

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[21] *See* Richard A. Posner, *Antitrust Law* (2d ed. 2001). Judge Posner has taken the position in his academic writing that the requirement that an antitrust plaintiff provide proof "of an actual conspiracy" to make out a claim under Section 1 is misguided and that, where it is "possible to demonstrate through economic evidence the existence of collusive pricing even though no overt acts of collusion are detected," such conduct should be punished. *Id.* at 79; *see also id.* at 94 ("This is where I part company with most other economically minded students of antitrust policy. If the economic evidence presented in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support the further inference that the collusion was explicit" – that is, "based upon actual communication between the parties.").

The opinion is likely to be widely understood to reflect a judgment that allegations of sequential price changes – even months or years apart – may be treated as simultaneous; that membership in trade associations is "[o]f note" where parallel pricing is alleged, App. 9a; and that allegations of price-fixing are implausible only when "lemonade stands," *id.*, and other such noncommercial markets are involved. That marks a major retreat from *Twombly*'s core holding. A change of that magnitude should come only from this Court.

II. THE LOWER COURT'S REFUSAL TO ALLOW BRIEFING ON THE MERITS IMPERMISSIBLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The fact that the court below ruled on the merits of petitioners' appeal without allowing any briefing on the merits presents an independent issue warranting review. That course of proceedings is inconsistent with the procedures established by the Federal Rules of Appellate Procedure and conflicts with the uniform practice of practically every circuit. To decide an important and unsettled question of circuit law without allowing the parties the opportunity to brief or argue the case – when no exigency required adoption of super-expedited procedures – "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

1. The Federal Rules of Appellate Procedure provide an appellant – at least in the typical case – the opportunity to make a full presentation of the merits of a challenge to a lower court's decision. Rule 31(a)(1) directs an appellant to "serve and [to] file a brief within 40 days after the record is filed." Fed. R. App. P. 31(a)(1). That brief, by rule, may extend to 14,000 words, and "[e]very court of appeals must accept documents that comply with the form requirements" of Rule 32, including its word limit. Fed. R. App. P. 32(a)(7)(B), (e). Further, Rule 34(a)(2) provides that "[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary." Fed. R. App. P. 34(a)(2).

The procedure for seeking an interlocutory appeal under 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5 does not take the place of merits briefing. Pursuant to statute, a petition for leave to appeal must be filed within 10 days of the district court's order certifying the case for interlocutory appeal. (That contrasts with the 40 days after filing of the record afforded to appellants under Rule 31.) Furthermore, a petition filed under Rule 5 is limited to 20 pages and must address "the facts necessary to understand the question presented; . . . the question itself; . . . the relief sought; . . . [and] the reasons why the appeal should be allowed and is authorized by a statute." Fed. R. App. P. 5(b)(1)(A)-(D); *see* Fed. R. App. P. 5(c). There is no requirement that the petition address the merits of the petitioners' challenge, except to the extent required to demonstrate "the reasons why the appeal should be allowed." Rule 5 reflects the understanding that, when a petition for appeal is granted, that will start the appeal – not end it. It provides that "[t]he date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules." Fed. R. App. P. 5(d)(2). That order triggers the ordinary procedural consequences of a notice of appeal, including a briefing schedule.

The Seventh Circuit indicated that "the merits of the appeal have been fully briefed in the parties' submissions." App. 7a. That statement is not correct. The carriers' petition did not brief the merits and devoted a scant four pages to explaining why there were substantial grounds for difference of opinion (which is not the same thing).[22] Petitioners were accordingly denied any opportunity to brief their case on the merits.

2. The Federal Rules reflect the common-sense judgment that full adversarial presentation of the merits of an appeal contributes to reliable decision-making and should be dispensed with only for a good reason.[23] In a case involving an interlocutory appeal, merits briefing is likely to be more important than in run-of-the-mill cases, not less. By statute, interlocutory appeals under § 1292(b) are restricted to cases that present close legal questions and will often involve legal questions of substantial importance. That was the case here: the court of appeals recognized that the case did not involve "routine application[] of well-settled legal standards." App. 6a. Rather, "*Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal* – from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired)." App. 6a-7a. "Pleading standards in federal litigation are in ferment." App. 7a.

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[22] The relevant portion of the petition filed below is reproduced in the Appendix at 112a-116a.

[23] Federal Rule of Appellate Procedure 2 allows a court of appeals "[o]n its own . . . motion" to "suspend any provision of these rules in a particular case and order proceedings as it directs" in order "to expedite its decision or for other good cause." Rule 2 has been used "to justify the use of expedited or summary appellate procedures." 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3948, at 28 (4th ed. 2008). Rule 2 thus "recognizes that there may be extraordinary situations, involving either the public interest or the concerns of expeditious judicial administration, where it becomes inappropriate to follow" ordinary procedures. *Id.* at 28-30 (footnotes omitted). The court of appeals did not refer to Rule 2 or find that its requirements – *i.e.*, an out-of-the-ordinary need for expedition or other good cause – justified the court's dramatic departure from the course of appellate procedures established by the Federal Rules.

Because interlocutory appeals pursuant to § 1292(b) present difficult and often important legal questions, only extraordinary circumstances would justify dispensing with merits briefing. The practice of all of the circuit courts – except the Seventh Circuit – supports that conclusion. Our research has uncovered a single case outside of the Seventh Circuit in which a court of appeals addressed the merits of an appeal pursuant to § 1292(b) based on the petition alone.[24] The Seventh Circuit – at least certain judges on that court – dispenses with merits briefing in interlocutory appeals practically as a matter of routine.[25]

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[24] *See Wallace v. Louisiana Citizens Prop. Ins. Corp.*, 444 F.3d 697, 701 n.5 (5th Cir. 2006). *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001), technically a second example, is distinguishable because the *Lienhart* court heard oral argument that dwelt "extensive[ly]" on the merits. *Id.* at 146.

[25] *See, e.g.*, *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (per curiam) (panel of Posner, Williams, and Tinder, JJ.), *cert. denied*, 131 S. Ct. 998 (2011); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 916 (7th Cir.) (Easterbrook, J.), *cert. denied*, 131 S. Ct. 506 (2010); *In re Sprint Nextel Corp.*, 593 F.3d 669, 676 (7th Cir. 2010) (Evans, J.); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir. 2010) (Posner, J.)

In none of the cited cases has the court justified its departure from the procedures generally required under the Federal Rules.

3. The Seventh Circuit's practice of refusing to consider merits briefing in interlocutory appeals departs from the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). The Court's attention is warranted, because the Seventh Circuit's practice significantly undermines the procedural avenue that Congress created by adopting § 1292(b). That statute – not routinely invoked – serves an important function in conserving the resources of parties and the courts in those situations where "immediate appeal . . . may materially advance the ultimate termination of . . . litigation." 28 U.S.C. § 1292(b). In the Seventh Circuit, unlike other circuits, litigants face the risk that by filing a petition for interlocutory appeal they may sacrifice the opportunity to present the merits of their challenge. Such an outcome improperly penalizes the exercise of a procedural right granted by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

(the panel opinion does not make clear that no merits briefing was received, but see the docket in No. 09-8042); *EEOC v. Sidley Austin LLP*, 437 F.3d 695, 696 (7th Cir. 2006) (Posner, J.); *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005) (Posner, J.); *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1028 (7th Cir. 2004) (Easterbrook, J.); *In re High Fructose Corn Syrup Antitrust Litig.*, 361 F.3d 439, 440-41 (7th Cir. 2004) (Posner, J.); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (Posner, J.).

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March 25, 2011

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Seventh Circuit, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (Dec. 29, 2010) 1a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (Apr. 30, 2010) 13a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (Dec. 10, 2009) 21a

Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (Jan. 26, 2011) 44a

Amended Consolidated Class Action Complaint, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (N.D. Ill. filed Oct. 16, 2009) 45a

Second Amended Consolidated Class Action Complaint, *In re Text Messaging Antitrust Litig.*, Case No. 08 C 7082, MDL No. 1997 (N.D. Ill. filed May 4, 2010) 76a

Petition for Interlocutory Appeal, *In re Text Messaging Antitrust Litig.*, No. 10-8037 (7th Cir. filed Nov. 2, 2010) (excerpt) 112a

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-8037

IN RE: TEXT MESSAGING ANTITRUST LITIGATION.

APPEAL OF: VERIZON WIRELESS, *ET AL.*,
Defendants.

Petition for Interlocutory Appeal from the
United States District Court for the
Northern District of Illinois, Eastern Division.

MDL No. 1997, Case No. 08 C 7082 –
Matthew F. Kennelly, *Judge.*

Submitted December 2, 2010
Decided December 29, 2010

Before POSNER, WOOD, and TINDER, *Circuit Judges.*

POSNER, *Circuit Judge.*

A class action suit that has been consolidated for pretrial proceedings in the district court in Chicago charges the defendants with conspiring to fix prices of text messaging services in violation of federal antitrust law. The district court allowed the plaintiffs to file a second amended complaint despite the defendants' objection, based on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), that the second complaint like the first failed to state a claim. The defendants asked the district judge to certify, for interlocutory appeal under 28 U.S.C. § 1292(b), the question of the complaint's adequacy. The judge agreed. He said: "Though (as plaintiffs argue) the Seventh Circuit had issued dozens of decisions concerning the application of *Twombly*, the contours of the Supreme Court's ruling, and particularly its application in the present context, remain unclear. The Court believes this is a subject on which reasonable minds could differ. The question presented is controlling, because there is at least a decent chance (though it is by no means certain) that were a court to rule the second amended complaint deficient, the case would be over. Finally, there is a good chance that immediate review may materially advance the ultimate conclusion of the case."

Section 1292(b) requires our permission to appeal as well as the district court's. The defendants have asked our permission and the plaintiffs urge us to turn them down. They argue that the proposed appeal does not present a "controlling question of law," as the statute requires. The question presented is whether the second amended complaint states a claim under the standard for pleading set forth in *Twombly*. It is a *controlling* question, because if the second amended complaint does not state a claim, the case is likely (though, as the district judge said, not certain) to be over; the plaintiffs are unlikely without discovery to be able to allege additional facts that would persuade the district court to allow them to file a third amended complaint if we held that the second should have been dismissed.

But is it a controlling question of *law*? It is not an abstract legal question such as whether the Sherman Act forbids price fixing; it is a question whether a particular complaint satisfies the pleading standard of *Twombly*. Yet the question's narrowness should not disqualify it, at least in the rather special circumstances presented by the appeal. Suppose the defendants had been overheard to say to each other "let's fix our ice machines," and the controlling question in the case was whether "ice machines" was a euphemism for prices of text messaging services. That would be a question of fact – and it would be pointless to allow an interlocutory appeal from its resolution. Disputed facts are resolved at trial – by the verdict if it's a jury trial and if it's a bench trial by the judge's findings of fact – and thus resolution comes at the end of the trial, which ordinarily is too late for an *interlocutory* appeal. Though there are cases in which a protracted hearing on relief follows the determination of liability, one can understand why Congress didn't think it necessary to authorize interlocutory appeals to decide whether a finding of fact by a district court was clearly erroneous.

The interlocutory appeal that we are asked to authorize in this case does not seek to overturn any findings of fact. The defendants are arguing rather that even if all the factual allegations of the complaint are true, the complaint is insufficiently plausible to satisfy *Twombly*. They are asking us to apply a legal standard – the pleading standard set forth in *Twombly* – to a set of factual allegations taken as true for purposes of the appeal.

A challenge to a trial court's application of a legal standard to a set of facts is often described as presenting a "mixed question of fact and law" or an "ultimate question of fact," but these are not helpful labels. The appellate court's task in such a case is to determine the legal significance of a set of facts. In

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), the Supreme Court left open the question whether appellate review of such a determination should be deferential, just as it is when reviewing findings of fact, but the rule in our court is that it should be. The main task of an appellate court, which is to maintain the coherence, uniformity, and predictability of the law, is not engaged by review of the application of a legal standard to a unique, nonrecurring set of particular facts. *Wellpoint, Inc. v. Commissioner*, 599 F.3d 641, 644 (7th Cir. 2010); *Barber v. Ruth*, 7 F.3d 636, 642-43 (7th Cir. 1993); *Mucha v. King*, 792 F.2d 602, 605-06 (7th Cir. 1986). No matter; in this case we have neither factfindings nor the application of a legal standard to factfindings; the question presented by the appeal is the sufficiency of the allegations of a complaint; and, most important, that question requires the interpretation, and not merely the application, of a legal standard – that of *Twombly*.

Furthermore, when the question presented by an appeal is whether *Twombly* requires dismissal of a complaint, the concerns underlying that decision argue for empowering the district court and the court of appeals to authorize an interlocutory appeal. *Twombly*, even more clearly than its successor, *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand. When a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp – "that Serbonian bog . . . where armies whole have sunk" (*Paradise Lost* ix 592-94) – and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert. Such appeals should not be routine, and won't be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b); but they should not be precluded altogether by a narrow interpretation of "question of law."

Now it is true that we ruled in *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000), that the term "question of law" in section 1292(b) refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact." We pointed out that "to decide whether summary judgment was properly granted requires hunting through the record compiled in the summary judgment proceeding to see whether there may be a genuine issue of material fact lurking there; and to decide a question of contract interpretation may require immersion in what may be a long, detailed, and obscure contract," whereas "if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case." *Id.* at 677; see also *Johnson v. Jones*, 515 U.S. 304, 309, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1007 (7th Cir. 2002); *In re Hamilton*, 122 F.3d 13 (7th Cir. 1997); *Malbrough v.*

Crown Equipment Corp., 392 F.3d 135, 136 (5th Cir. 2004); *Foster Wheeler Energy Corp. v. Metropolitan Knox Solid Waste Authority, Inc.*, 970 F.2d 199, 202 (6th Cir. 1992); *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991). As we read in *Malbrough v. Crown Equipment Corp., supra*, 392 F.3d at 136, "the underlying issue of whether [the plaintiff] has presented sufficient evidence to show a 'genuine issue . . . [of] material fact', and thus avoid summary judgment . . . , is not a question of law within the meaning of § 1292(b)."

But in this case there is no question of hunting through a record or immersing ourselves in a complicated contract, and moreover we *do* have a question of the meaning of a common law doctrine – namely the federal common law doctrine of pleading in complex cases, announced in *Twombly*. Decisions holding that the application of a legal standard is a controlling question of law within the meaning of section 1292(b) are numerous. See *Portis v. City of Chicago*, 613 F.3d 702 (7th Cir. 2010); *Armstrong v. LaSalle Bank Nat'l Ass'n*, 552 F.3d 613, 615-16 (7th Cir. 2009); *Florence v. Board of Chosen*, 621 F.3d 296, 301 (3d Cir. 2010); *Weintraub v. Board of Educ. of City School Dist.*, 593 F.3d 196, 200-01 (2d Cir. 2010); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 380 (5th Cir. 2004); *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783-84 (8th Cir. 1998); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 720-21 (11th Cir. 1987).

Not that routine applications of well-settled legal standards to facts alleged in a complaint are appropriate for interlocutory appeal. But *Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal* – from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired). This court has only twice discussed the application of *Twombly* to antitrust violations, and in both cases only in passing. *Tamburo v. Dworkin*, 601 F.3d 693, 699-700 (7th Cir. 2010); *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 595, 596 (7th Cir. 2008). Pleading standards in federal litigation are in ferment after *Twombly* and *Iqbal*, and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of section 1292(b). Cf. *Boim v. Quranic Literacy Institute*, *supra*, 291 F.3d at 1007. The previous cases do not address the relation of *Twombly* to the standards for interlocutory appeals under that section, and that is a further novelty that justifies the conclusion that the appeal presents a genuine question of law.

So we grant the application for interlocutory appeal, and, since the merits of the appeal have been fully briefed in the parties' submissions and would not, we think, be illuminated by oral argument, we proceed to the merits.

The complaint in *Twombly* alleged that the regional telephone companies that were the successors to the Bell Operating Companies which AT&T had been forced to divest in settlement of the government's antitrust suit against it were engaged in "parallel behavior." Bluntly, they were not competing. But section 1 of the Sherman Act, under which the suit had been brought, does not require sellers to compete; it just forbids their agreeing or conspiring not to compete. So as the Court pointed out, a complaint that merely alleges parallel behavior alleges facts that are equally consistent with an inference that the defendants are conspiring and an inference that the conditions of their market have enabled them to avoid competing without having to agree not to compete. The core allegations of the complaint in *Twombly* were simply that "In the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [other carriers] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.* at 551, 127 S.Ct. 1955.

Our defendants contend that in this case too the complaint alleges merely that they are not competing. But we agree with the district judge that the complaint alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly*. It is true as the defendants contend that the differences between the first amended complaint, which the judge dismissed, and the second, which he refused to dismiss, are slight; but if his refusal to dismiss the second complaint is properly described as a reconsideration of his ruling on the first, so what? Judges are permitted to reconsider their rulings in the course of a litigation.

The second amended complaint alleges a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion. There is nothing incongruous about such a mixture. If parties agree to fix prices, one expects that as a result they will not compete in price – that's the purpose of price fixing. Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing, though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion. An accusation that the thousands of children who set up makeshift lemonade stands all over the country on hot summer days were fixing prices would be laughed out of court because the retail sale of lemonade from lemonade stands constitutes so dispersed and heterogeneous and uncommercial a market as to make a nationwide conspiracy of the sellers utterly implausible. But the complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect "cheating" (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities.

Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings. This allegation identifies a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect. The complaint further alleges that the defendants, along with two other large sellers of text messaging services, constituted and met with each other in an elite "leadership council" within the association – and the leadership council's stated mission was to urge its members to substitute "co-opetition" for competition.

The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices. This is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price. And there is more: there is an allegation that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. The change in the industry's pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption.

A footnote in *Twombly* had described the type of evidence that enables parallel conduct to be interpreted as collusive: "Commentators have offered several examples of parallel conduct allegations that would state a [Sherman Act] § 1 claim under this standard . . . [namely,] 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties' . . . [;] 'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.' The parties in this case agree that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy." *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 557 n.4, 127 S.Ct. 1955 (citations omitted). That is the kind of "parallel plus" behavior alleged in this case.

What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price. The second amended complaint does allege that the defendants "agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services," but does not allege direct evidence of such an agreement; the allegation is an inference from circumstantial evidence. Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Miles Distributors, Inc. v. Specialty Construction Brands, Inc.*, 476 F.3d 442, 449 (7th Cir. 2007); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 661-62 (7th Cir. 2002); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998); *Johnson v. Hospital Corp. of America*, 95 F.3d 383, 392 (5th Cir. 1996). We need not decide whether the circumstantial evidence that we have summarized is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility."

The Court said in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S.Ct. at 1949. This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.

The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08 C 7082
MDL No. 1997

IN RE: TEXT MESSAGING ANTITRUST LITIGATION

THIS ORDER APPLIES TO: ALL ACTIONS

[Filed Apr. 30, 2010]

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

On December 12, 2009, the Court granted defendants' motion to dismiss plaintiffs' first amended complaint and gave plaintiffs until January 8, 2010 to file an amended complaint that included a viable claim for relief. *In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009). Plaintiffs have moved to amend their complaint. For the reasons stated below, the Court grants the motion.

Discussion

Federal Rule of Civil Procedure 15(a)(2) provides that a "court should freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. Proc. 15(a)(2). The Supreme Court has held that leave to amend should be "freely given" unless there is good reason to deny the motion, such as undue delay, bad faith, futility of the amendment, or repeated failure to cure deficiencies. *Foman v. Davis*, 371 U.S.

178, 182 (1962). Defendants argue that leave to amend should be denied as futile because the proposed second amended complaint fails to state a claim.

1. The dismissal of plaintiffs' first amended complaint

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility requires "enough facts to raise a reasonable expectation that discovery will reveal evidence" of defendants' liability. *Id.* at 556.

In its December 10 decision, the Court ruled that to state a claim in the antitrust conspiracy context:

> (1) a plaintiff must allege a "plausible" conspiracy to fix prices; (2) an allegation of conspiracy that rests on conduct "merely consistent with" an agreement does not rise to the level of plausibility; and (3) allegations of conspiracy that do not rise to the level of plausibility do not give rise to a reasonable inference of a conspiracy that a court must draw in the plaintiff's favor.

In re Text Messaging, 2009 WL 5066652, at *5.

The Court concluded that plaintiffs' first amended complaint did not meet this plausibility standard. *Id.* at *5-10. The Court determined that the first amended complaint did not include "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at *5 (citing *Twombly*, 550 U.S. at 553-54). In the first amended complaint, plaintiffs alleged that defendants engaged in parallel pricing, had the opportunity to collude through an industry group, the CTIA, and failed to deny a price-fixing conspiracy when responding to Congressional inquires [*sic*] into the matter. They further alleged that the structure of the text messaging market was prone to collusion and that price increases were "historically unprecedented," contrary to common economic experience, and against defendants' interest. These factors taken together, plaintiffs argued, supported an inference that defendants must have agreed to collude on prices.

The Court disagreed. The Court noted (incorrectly, as it turns out) that the first amended complaint did not squarely allege that the defendants had entered into an actual agreement. The Court also noted that defendants had not identified any specific times, places, or person involved in the conspiracy. *Id.* at *6. The latter factor defeated any argument that the plaintiffs had alleged sufficient facts to support a claim that defendants expressly agreed to fix prices. *Id.*

Because *Twombly* allows for the possibility of tacit agreements, the Court also evaluated the first amended complaint to determine whether it alleged facts sufficient to support an inference of a tacit agreement. Plaintiffs alleged that the defendants had the opportunity to collude through the CTIA and the Wireless Internet Caucus (WIC) leadership council. They did not, however, offer any specifics about the parties, purpose, or approximate dates of a plausible conspiracy; details about the structure and content of the meetings or the type of employees who attended them; statements by any defendant suggesting the presence of an agreement; or indication of the terms of the alleged agreement. *Id.* Such factors would have supported an inference of conspiracy. The Court concluded that the facts as alleged reflected, at most, an opportunity to conspire. This, without more, was insufficient to sustain an inference that there was a tacit conspiracy to fix prices. *Id.* at *7 (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1242 n.15 (3d Cir. 1993)).

Plaintiffs also alleged that the market for text messaging services behaved in a noncompetitive manner, defendants acted against their interests by falling [sic] to compete on the price of individual text messages, and collusion could be inferred from the defendants' failure to deny a price-fixing scheme in their response to Congressional inquiries into text messaging prices. The Court found that these allegations, together with plaintiffs' other allegations, "[did] not give rise to more than the 'mere possibility' of an agreement, which is insufficient to state a claim for conspiracy under the Sherman Act." *Id.* at *11 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)).

2. Proposed second amended complaint

Plaintiffs have moved to amend their complaint. Their proposed second amended complaint includes an allegation that in 2005-06, the defendants "agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services." Proposed 2d Am. Compl. ¶ 80. Fairly read, this is an allegation of an express agreement. The Court confesses that it mistakenly did not see things that way when it reviewed the prior version of the complaint, which included a similar allegation. That said, the Court has not wavered from its view that the earlier version of the complaint was insufficient to state a claim of conspiracy to fix prices. The bare allegation of an agreement was, as noted earlier, unsupported by particulars, and the thrust of plaintiffs' argument in response to the earlier motion to dismiss was that there was a tacit agreement involving parallel conduct, not an express agreement.

The proposed second amended complaint, however, provides additional support for the claim of an express agreement that carries plaintiffs over the plausibility threshold. This support includes the following allegations:

- An allegation that defendants expressly agreed to adopt a uniform per-unit price of text messaging services. Proposed 2d Am. Compl. ¶ 5.
- An allegation that the WIC, a division of the CTIA industry trade group, formed committees of defendants' high-level executives that conducted meetings "narrowly focused on text messaging delivery *and pricing*." *Id.* ¶ 11 (emphasis added).
- An allegation that the expressed purpose of the WIC Leadership Council was to engage in "co-oopetition" (sic) that would allow the purported competitors to "profit[] together by placing the interests of the industry above and before the individual companies' individual interests." *Id.* ¶ 12.
- Identification (by name) of several leaders from the defendant companies who participated in the WIC leadership council during the period when the alleged conspiracy was devised and carried out, and dates on which meetings of the council occurred. *Id.* ¶¶ 103, 104.
- An allegation that the WIC leadership council meetings were used to, among other things, disseminate detailed information regarding text messaging pricing. *Id.* ¶ 107.

Critical among plaintiffs' additions to the complaint are the allegations that the defendants exchanged pricing information at meetings of an industry group whose express purpose was to favor the group as a whole over its individual members, as well as the allegations identifying the participants in the meetings and the dates (or approximate dates) of the meetings. The Court does not adjudicate the truth of those allegations at this juncture of the case; rather, it takes them as true and evaluates their sufficiency to sustain plaintiffs' claim. *See, e.g., Tamburo v. Dworkin*, --- F.3d ----, 2010 WL 1387288, at *3 (7th Cir. Apr. 8, 2010) ("[A] complaint alleging an antitrust claim must contain 'enough factual matter (taken as true) to suggest that an agreement was made.") (quoting *Twombly*, 550 U.S. at 556); *London v. RBS Citizens, N.A.*, --- F.3d ----, 2010 WL 1235843, at *2 (7th Cir. Apr. 1, 2010) (a court reviewing a motion to dismiss "tak[es] the factual allegations pleaded by the plaintiffs as true and draw[s] all reasonable inferences in their favor"); *In re marchFIRST Inc.*, 589 F.3d 901, 904 (7th Cir. 2009) (same).

Defendants argue that the new allegations in the proposed second amended complaint add nothing of consequence. The Court disagrees. Plaintiffs have alleged specifics about the time, place, and attendees of the CTIA and WIC meetings, and they have expressly alleged that defendants agreed in at least some of these meetings to raise prices by a certain amount within a certain time frame. These new factual allegations add specificity and detail that lends plausibility to plaintiffs' claim of a conspiracy to fix prices.[1]

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[1] The Court also notes, though it is not crucial to the decision, that plaintiffs have alleged in their second amended complaint

Plaintiffs' new allegations, of course, do not stand alone. Rather, they must be read in conjunction with plaintiffs' other allegations, including those that were in the previous version of the complaint. Plaintiffs have also clarified that they contend that prior to the conspiracy, defendants were not charging a common price – contrary to what the Court assumed from their earlier complaint. *See In re Text Messaging*, 2010 WL 5066652, at *8. Plaintiffs have also reasserted their earlier allegations that defendants made parallel price increases for individual text messages following CTIA/WIC meetings. Those allegations were, the Court ruled, insufficient in the context of the prior version of the complaint. But when viewed in light of plaintiffs' new allegations providing further detail about the nature of the alleged conspiratorial meetings and their participants, as well as the contention that the defendants exchanged pricing information at those meetings, the Court now concludes that plaintiffs have alleged enough to take their conspiracy claim out of the realm of the conclusory or merely possible and carry it into the realm of the plausible. Plaintiffs no longer allege "[no]thing other than 'merely parallel conduct that could just as well be independent action,'" *id.* at *11 (quoting *Twombly*, 550 U.S. at 558). Rather, they have now sufficiently alleged an actionable agreement among the defendants to fix prices.

Defendants correctly point out that plaintiffs' allegations regarding the content of the meetings are not

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that the WIC leadership council stopped tracking company-by-company text messaging revenues immediately after this suit was filed. This allegation, considered together with plaintiffs' other allegations detailed here and in the Court's prior decision, further supports the claim of conspiracy.

documented by any of the evidence they cite in their complaint or in their motion to amend. That, however, is not necessary. Neither *Twombly* nor *Iqbal* requires a plaintiff to prove his case in the complaint, nor do they impose a summary judgment-like standard to be applied at the pleading stage. Indeed, though these cases require a plaintiff's claims to be plausible, they "do[] not impose a probability requirement at the pleading stage." *Twombly*, 550 U.S. at 556. An otherwise "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Id.*[2]

Conclusion

For the reasons stated above, the Court grants plaintiffs' motion for leave to amend [docket no. 131]. The case is set for a status hearing on May 18, 2010, at 9:30 a.m., to discuss discovery parameters and scheduling.

/s/ MATTHEW F. KENNELLY
MATTHEW F. KENNELLY
United States District Judge

Date: April 30, 2010

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[2] Defendants argue that the presence at CTIA/WIC meetings of persons other than representatives of the defendants defeats any claim that a conspiracy could have been hatched or carried out during those meetings. Accepting this argument would require the Court to find facts against the plaintiffs and contrary to their allegations, which is inappropriate on a motion to dismiss for failure to state a claim, even in the post-*Twombly* and *Iqbal* environment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08 C 7082
MDL No. 1997

IN RE: TEXT MESSAGING ANTITRUST LITIGATION

THIS ORDER APPLIES TO: ALL ACTIONS

[Filed Dec. 10, 2009]

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiffs have filed this suit on behalf of all those who purchased text messaging services on a fee-per-message basis from defendants or their predecessors, subsidiaries, or affiliates from January 1, 2005 to the present. Plaintiffs allege that defendants, the four national wireless communications service providers, entered into and implemented a "continuing contract, combination, and conspiracy to fix, raise, maintain, and stabilize prices for Text Messaging Services sold in the United States" in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Compl. ¶ 1. Defendants have moved to dismiss plaintiffs' consolidated complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiffs have not alleged facts sufficient to state a claim that defendants entered into an unlawful conspiracy. For the reasons stated below, the Court grants defendants' motion.

Plaintiffs' Allegations

The Court takes the following facts from the allegations in plaintiffs' amended consolidated complaint.

The defendants in this case are Sprint/Nextel, Verizon, AT&T, and T-Mobile. They are the four national providers of wireless services in the United States. Collectively, they control more than ninety percent of the U.S. market for text messaging services.

Text messaging involves the use of cellular telephones to send and receive short messages, generally limited to 160 characters. Defendants transmit text messages on existing cellular network connections. Because the size of the messages is small, it costs defendants very little – a fraction of one cent – to transmit an individual text message. In 2008, defendants transmitted 2.5 trillion text messages for almost 263 million wireless subscribers in the United States. An estimated 3.3 trillion text messages will be sent in 2009.

Consumers have two choices when purchasing text messages. They may pay on a per-message basis, or they may purchase a bundled plan, which, depending on the plan, includes either a set allotment or an unlimited number of text messages. Most cellular subscribers purchase text messaging plans. It is estimated, however, that between two and ten percent of text messages sent and received in the U.S. are purchased on a per-message basis, either because the customer has not purchased a bundled plan or because she has exceeded her plan's allotments. The total revenue from text messages purchased on a per-message basis in the U.S. in 2008 is estimated to be $10 billion.

Text messaging was first introduced in the U.S. by AT&T in 2002. In the years after text messaging's introduction and prior to the start of the alleged conspiracy, defendants charged disparate prices for individual text messages purchased on a per-message basis, often resulting in lower costs to consumers.

Beginning in 2005, however, defendants began charging the same prices for text messages purchased on a per-message basis:

- as of the second quarter of 2006, prior to the start of the alleged conspiracy, all four defendants charged ten cents for individual text messages purchased on a per-message basis;
- In the fourth quarter of 2006, Sprint-Nextel raised its price for individual text messages to fifteen cents. In the first and second quarters of 2007, AT&T, Verizon, and T-Mobile also raised their per-message text messaging rates from ten cents to fifteen cents.
- In late 2007, Sprint-Nextel raised its per-message rates again, from fifteen to twenty cents. AT&T and Verizon followed suit in the first quarter of 2008, and T-Mobile matched that price in the third quarter of 2008.

During this same period, defendants' prices for other wireless services, such as voice calling and data transmission, decreased.

Plaintiffs allege that the per-message price for text messages reflects a substantial mark-up over the per-unit cost of transmitting text messages. They also allege that as per-message prices for text messaging were increasing, defendants' cost of transmitting text messages decreased. During this same time period, defendants' capacity to send and receive text messages increased, and defendants have the infrastructure to transmit many more text messages than they currently send.

Plaintiffs allege that, absent collusion, per-unit prices for text messages should have decreased as defendants' costs decreased. Instead, all four companies increased their prices in the same way – from ten to fifteen cents, then from fifteen to twenty cents – around the same time. Plaintiffs assert that this is highly unusual conduct and a departure from what occurred as a result of what they allege was active competition for per-unit text messaging customers prior to 2005. According to plaintiffs, defendants' lockstep price increases could only have resulted from a price-fixing conspiracy. Plaintiffs allege alternatively that Sprint-Nextel's two five-cent price increases constituted "offers" to the other three defendants to engage in price-fixing, which plaintiffs allege the other defendants "accepted" when they raised their prices by the same amounts.

Plaintiffs also allege that defendants are all members of CTIA-The Wireless Association (CTIA), a trade organization based in Washington, D.C., and The Groupe Speciale Mobile Association (GMSA), an international trade group of cellular providers. Plaintiffs allege that in early 2002, shortly after text messaging was introduced in the U.S., the defendants, via the CTIA, negotiated an agreement that allows each carrier's text messaging service to communicate with the other defendants' services. Because of this agreement, consumers can send text messages to any cellular phone user, regardless of the recipient's wireless service provider. Defendants have met regularly via CTIA's biannual conventions since 2002. Plaintiffs allege that these conventions and other trade association meetings have provided defendants with the opportunity to conspire to fix prices for text messages purchased on a per-message basis.

CTIA also collects data on the wireless industry, and it has a "Wireless Internet Caucus," whose leadership council meets quarterly and includes members from all four defendant companies. Sprint-Nextel announced its two five-cent increases in the price of individual text messages within one month after the mid-year meetings of the leadership council. Plaintiffs cite this as further evidence of a conspiracy.

CTIA also established and controls the Common Short Code Association (CSCA), an organization that promotes the sale of Common Short Codes (CSCs). CSCs are five- or six-digit numeric codes to which text messages can be addressed from a wireless device. Wireless phone users can use CSCs to (among other things) cast votes in reality show contests, receive information about products and services from vendors or advertisers, and receive mobile updates about their favorite sports teams. Plaintiffs allege that defendants stand to gain substantial revenue from the increased use of CSCs, from both the higher volume of text messages sent and received and the fees defendants collect from businesses and advertisers that wish to use CSCs to reach their customers. Plaintiffs allege that defendants have collusively used the CSCA to expand the use of text messaging services by encouraging the development of CSC applications that are highly appealing to consumers and then have collusively capitalized on this expanded market by controlling the pricing of text messaging services.

Finally, plaintiffs allege that the market for text messaging services is conducive to collusion. The wireless services market is heavily concentrated; there are high barriers to entry; and text messaging services are homogeneous, with no discernable differences among the form or appearance of the text messaging services offered by the defendants. Plaintiffs allege that these structural factors facilitate collusion among defendants and prevent new competitors from entering the market to undercut artificially high prices on individual text messages.

Plaintiffs contend that these facts, taken together, support a reasonable inference that defendants conspired to raise and fix prices on single text messages purchased on a per-message basis in violation of section 1 of the Sherman Act. Plaintiffs allege that they and other class members have been injured by defendants' conduct because they are unable to purchase text messages on a per-message basis except at prices higher than they would have to pay in the absence of defendants' unlawful conduct.

Discussion

1. Standard of review on a motion to dismiss

When considering a motion to dismiss a complaint, the Court accepts the facts stated in the complaint as true and draws reasonable inferences in favor of the plaintiff. *Newell Operating Co. v. Int'l Union of United Auto., Aerospace, and Agr. Implement Workers of Am.*, 532 F.3d 583, 587 (7th Cir. 2008). Though rule 8(a)(2) does not require a complaint to include "detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). To survive a motion to dismiss, a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Plausibility requires "enough facts to raise a reasonable expectation that discovery will reveal evidence" of defendants' liability. *Id.* at 556.

The Seventh Circuit recently noted that "the height of the pleading requirement is relative to circumstances." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009). In complex cases like the antitrust action at issue here, in which discovery will be complicated, time-consuming, and expensive, "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 557-58 (internal citations omitted).

2. Application of standard of review to Sherman Act § 1 claims

Section 1 of the Sherman Act prohibits only those restraints of trade "effected by a contract, combination, or conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). Horizontal price-fixing of the sort alleged here is a *per se* violation of § 1. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). But because "without more, parallel conduct does not suggest conspiracy," *Twombly*, 550 U.S. at 557, "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Id.* at 553 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

Plaintiffs acknowledge that their allegations of parallel pricing "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 558. At the pleading stage, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; a claim must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. This "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

At the pleading stage, of course, a plaintiff need not, and typically cannot, present all the evidence that he would need to prove a conspiracy at summary judgment or trial. *Twombly* did not supplant the notice-pleading regime of the Federal Rules 8(a)(2) but rather held "the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w]' that the pleader is entitled to relief." *Id.* at 557 (citing Fed. R. Civ. P. 8(a)(2)). This "'plausibility standard' is not akin to a probability requirement, but it asks for more than a sheer possibility that the defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949 (2009).

Though the Court must "accept as true all of the allegations contained in a complaint," this "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. Further, though a court still must draw "all reasonable inferences in favor of the plaintiff," *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008), "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 1949.

Given the current state of the law of pleading, at least in the context of antitrust case involving complex facts and very time-consuming discovery, it appears that: (1) a plaintiff must allege a "plausible" conspiracy to fix prices; (2) an allegation of conspiracy that rests on conduct "merely consistent with" an agreement does not rise to the level of plausibility; and (3) allegations of conspiracy that do not rise to the level of plausibility do not give rise to a reasonable inference of a conspiracy that a court must draw in the plaintiff's favor.

3. Parallel actions

Plaintiffs allege two episodes of parallel pricing activity by defendants. The first was the 2006 move by Sprint-Nextel to raise single-message text messaging rates from ten to fifteen cents, which Verizon, AT&T, and T-Mobile followed within eight months. The second was the 2007 price change, again led by Sprint-Nextel, from fifteen to twenty cents, which Verizon, AT&T, and T-Mobile matched within ten months. The defendants' parallel actions were spread out over several months; defendants refer to them as "sequential" rather than "simultaneous." Defs.' Mot. at 1. For purposes of this motion, however, the Court will accept that these acts sufficiently identify "parallel conduct."

4. Inference of agreement

Even "conscious parallelism," however, is "not in itself unlawful" under the Sherman Act. *Twombly*, 550 U.S. at 553-54. A viable antitrust price-fixing claim requires an agreement among the defendants. The Court therefore turns to the plaintiffs' other allegations to determine whether they offer "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556.

Plaintiffs do not allege in their complaint that there was an express agreement among the defendants, and they offer no "specific time, place, or person involved in the alleged conspirac[y]." *Id.* at 565 n.10. As in *Twombly*, the plaintiffs in this case do make scattered references throughout their complaint to "defendants' collusive behavior" (Compl. ¶ 81) and state that the defendants "acted in concert" (*id.* ¶¶ 119 and 123). *See In re Travel Agent Comm'n Antitrust Litigation*, 583 F.3d 896, 905 (6th Cir. 2009). These statements, however, are, "on fair reading . . . merely legal conclusions resting on the prior allegations," and thus they are not entitled to an assumption of truth. *Twombly*, 550 U.S. at 564.

According to the Seventh Circuit, "it is generally believed . . . that an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002). This would require a plaintiff to prove "that there was an actual, manifest agreement not to compete." *Id.* at 661. *Twombly*, though, allows for the possibility of a "tacit" agreement, *see Twombly*, 550 U.S. at 553, so the Court proceeds to evaluate the plaintiffs' pleadings to determine whether they support an inference of either a tacit or express agreement.

Plaintiffs allege several facts that they say support an inference of agreement sufficient to state a claim under section 1. These are: defendants' opportunities to collude through trade organizations; defendants' failure to deny any price-fixing conspiracy in responding to Congressional inquires [*sic*] into the matter; economic factors showing that the structure of the text messaging market is prone to collusion and that price increases were contrary to common economic experience and against defendants' interest; and the "historically unprecedented" nature of the parallel price increases.

Plaintiffs argue, correctly, that the Court must avoid compartmentalizing plaintiffs' allegations but rather consider the allegations "as a whole and in combination." *High Fructose Corn Syrup*, 295 F.3d at 661. Practicality, however, demands that the Court discuss plaintiffs' allegations individually before it can evaluate them together.

a. Participation in trade organizations

A substantial portion of the plaintiffs' complaint describes the various trade organizations in which defendants participate, including the CTIA, the GMSA, the Wireless Internet Caucus leadership council, and the CSCA. Plaintiffs note that these organizations collect and distribute data about the wireless industry, which is available to defendants. Plaintiffs further cite the organizations' annual conferences, quarterly meetings, and regular phone calls, plus defendants' leadership roles in these organizations, as demonstrating defendants' "opportunity to conspire to set pricing for Text Messaging Services." Compl. ¶ 101.

Notably, however, plaintiffs offer no specifics that "identif[y] the parties, purpose, and approximate dates of a plausible conspiracy." *Hoeft v. Dommisse*, 2009 WL 2562749, at *2 (7th Cir. Aug. 20, 2009). They make no allegations about particular meetings at which they contend any of the defendants reached an agreement. They do not allege any "details about the structure and content of these meetings" or "the types of employees who attended the meetings." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009). They offer no statements by any of the defendants suggesting the presence of an agreement. *See, e.g., High Fructose Corn Syrup*, 295 F.3d at 662; *see also, Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 885-86 (N.D. Ill. 2009). Nor do they give any indication of the terms of the alleged agreement. *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 371-72 (M.D. Pa. 2008); *see also, Wanachek Mink Ranch v. Alaska Brokerage Int'l, Inc.*, No. C06-089RSM, 2009 WL 1342676, at *3 (W.D. Wash. May 5, 2009).

Plaintiffs allege that Sprint-Nextel raised its prices from ten to fifteen cents approximately a month after the CTIA's 2006 mid-year meeting, and from fifteen to twenty cents approximately a month after CTIA's 2007 mid-year meeting, and that "other Defendants followed shortly thereafter." Compl. ¶ 101. They stop short, however, of alleging that the defendants reached an agreement at those meetings. Even reading the complaint broadly, an inference that Sprint-Nextel's actions taken "approximately a month" after a meeting resulted from an agreement undertaken at that meeting would be unreasonable given the current state of the law regarding pleading in cases of this type. This is particularly true because, by plaintiffs' time line, the other defendants did not match the price increases until six to ten months later (presumably after a different biannual meeting).[1]

An "opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1242 n.15 (3rd Cir. 1993). Participation in "points of contact or relationships for promotion of mutual interest" (like a trade organization) does not, without more, support an inference of conspiracy. *Weit v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 641 F.2d 457, 468-469 (7th Cir. 1981). The Court thus proceeds to analyze the additional factors which plaintiffs plead in support of an inference of conspiracy.

b. Congressional investigation

Plaintiffs allege that on September 9, 2009, the chairman of the Senate Antitrust Subcommittee sent a letter to the defendants inquiring into their increases in prices for text messages purchased on a per-message basis. Compl. ¶ 86. Plaintiffs attached the letter to their complaint. The letter noted that such increases were "hardly consistent with vigorous price competition" and asked defendants to reply to several questions about the pricing of text messaging services. Because, however, the letter made no direct allegation of price fixing, the Court cannot infer an agreement to fix prices from defendants' failure to deny such an allegation.

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[1] Plaintiffs have submitted as supplemental authority a decision in which Kidge [sic] Ruben Castillo denied a motion to dismiss, finding that the plaintiffs in an antitrust had satisfied the *Twombly* pleading standard. *In re Potash Antitrust Litig.*, --- F. Supp. 2d ----, No. 08 C 6910, 2009 WL 3583107 (N.D. Ill. Nov. 3, 2009). In *Potash*, plaintiffs alleged that defendants' executives met on a specific date and that three defendants almost simultaneously shut down plants to cut production within a month of that meeting. The court found that this, combined with plaintiffs' other substantial factual allegations, supported the allegation an agreement was reached. The more vague and widely-spaced allegations in plaintiffs' complaint here do not give rise to the same inference.

c. *Economic factors*

When, as in this case, the non-economic factors supporting the contention that defendants agreed not to compete is "suggestive rather than conclusive," *High Fructose Corn Syrup*, 295 F.3d at 655, "economic evidence suggesting that defendants were not in fact competing [is] important." *Id.* Such economic evidence can be divided into two sub-types: "evidence that the structure of the market was such as to make secret price fixing feasible; . . . and evidence that market behaved in a noncompetitive matter." *Id.*

Plaintiffs allege both of these types of economic evidence. First, they assert that the structure of the text messaging market makes it prone to price-fixing. The wireless communications industry is heavily concentrated, and defendants control ninety percent of the U.S. text messaging market. Compl. ¶ 124. The defendants are the only large national wireless carriers, and extremely high barriers to entry prevent new entrants. *Id.* ¶ 125. Plaintiffs also contend that text messaging as a product lends itself to collusion because it is homogenous; consumers cannot perceive any differences in the text messaging services offered by the various defendants. *Id.* ¶ 26. Taking these allegations as true, the plaintiffs have sufficiently alleged facts that suggest that the wireless services market is an interdependent, concentrated industry where price-fixing is "feasible." *High Fructose Corn Syrup*, 295 F.3d at 655.

Plaintiffs also allege that the text messaging market "behaved in a noncompetitive manner." *Id.* Specifically, plaintiffs allege, first, that contrary to expected behavior in a competitive market and against defendants' economic interests, defendants engaged in parallel pricing, and no defendant took advantage of the opportunity to gain more customers by offering lower per-message text messaging rates. Second, they allege that this kind of parallel pricing was historically unprecedented. Third, they allege that defendants' costs for text messaging decreased and their capacity for sending messages increased during the period of price increases. These allegations, however, do not support a reasonable inference of an agreement.

i. *Failure to compete on price of single text messages*

Plaintiffs' primary factual allegation of noncompetitive behavior is their allegation of parallel pricing by the defendants. Plaintiffs note that "not one Defendant attempted to attract additional customers by charging even a penny less per text message." Compl. ¶ 5. They also assert that "because the per unit cost of text messages is very low, distinct pricing would be an easy and affordable way for any one of the Defendants to distinguish itself from its competitors." *Id.* ¶ 3. Plaintiffs maintain that this kind of pricing is inconsistent with competitive behavior and thus must result from an agreement to fix prices.

Though it may be true that defendants could attempt to compete for customers based on per-message text messaging rates, it does not follow that their failure to do so results from an agreement. On the contrary, in a concentrated industry like the wireless services industry, "a firm . . . has reason to decide (individually) to copy an industry leader . . . . One does not need an agreement to bring about this kind of follow-the-leader effect." *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992).

ii. "Historically unprecedented" changes in pricing structure

Plaintiffs allege that the parallel price increases for per-message text messaging services represent "'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason.'" Compl. ¶ 6 (quoting *Twombly*, 550 U.S. at 557 n.4). To bolster their contention that this was historically unprecedented and resulted from an agreement, plaintiffs describe a 2003 increase in text messaging prices by Sprint-Nextel, which the other providers did not match, and which Sprint-Nextel ultimately rolled back.

Plaintiffs' use of the "historically unprecedented" language is not an accident: it is one of the few examples *Twombly* offers of the sort of conduct that may give rise to an inference of conspiracy. In the factual context of the present case, however, plaintiffs' invocation of this language is closer to a "threadbare recital[] of the elements of a cause of action, supported by mere conclusory statements" than it is to a statement of facts tending to support an inference of conspiracy. *Iqbal*, 129 S. Ct. at 1949. Two five-cent price increases can hardly be characterized as "complex," or even as "historically unprecedented" – by the plaintiffs' own time line, the defendants had arrived at a common per-message price of ten cents *before* the alleged conspiracy began. Compl. ¶ 74. Further, it would be difficult to characterize changes occurring over an eleven-month period (the time from Sprint-Nextel's price increase to twenty cents to the time when T-Mobile matched that price) as occurring "at the very same time." *Twombly*, 550 U.S. at 557 n.4.

Finally, as discussed in greater detail below, one cannot say that there is "no other discernable reason" for the cited price increases or for the fact that Sprint-Nextel's price increases succeeded here where before they had failed. Text messaging is a relatively new form of wireless communication, available in the United States only since 2002. The market for this kind of wireless communication has grown substantially in the seven years since it was introduced. Compl. ¶¶ 53-57, 92-100. Sprint-Nextel's unsuccessful 2003 attempt to raise per-message prices, at a time when the technology was new and a higher per-message price might have caused consumers to avoid even trying out text messaging, does not suggest that a successful price increase several years later must have resulted from an agreement. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d at 908.

On the contrary, plaintiffs cite the "obvious alternative explanation" in their own complaint: as text messaging became more popular, defendants sought to encourage consumers to purchase text messaging services as part of a bundled plan. Compl. ¶ 123. By increasing the per-message price for text messages and encouraging subscribers to increase their usage of text messages through initiatives like the development of CSCs, providers could create an incentive for subscribers to purchase bundled plans to avoid the wildly varied (and sometimes wildly expensive) bills that could result from per-message pricing.

iv. Decreasing costs and overcapacity

Plaintiffs allege that the cost of transmitting individual text messages decreased during the same period when the defendants were raising individual text message prices. Even if the Court assumes, as plaintiffs allege, that defendants' pricing for individual text messages resulted in revenues that were "*several thousand times* what it actually costs" to transmit a text message, Compl. ¶ 63 (emphasis in original), plaintiffs have "done nothing more than assert that profits were extraordinary . . . not . . . that they were beyond those afforded by a competitive market." *Reserve Supply*, 971 F.2d at 51. Where, as here, the fixed costs associated with an industry are high, Compl. ¶ 125, self-interested producers might attempt to charge higher than marginal cost prices for their products in order to recover some of their fixed costs. *See High Fructose Corn Syrup*, 295 F.3d at 658. Defendants, if they observed that consumers did not bolt from Sprint-Nextel and to their services in the face of 2006 and 2007's increased per-message text messaging rates, would not need an agreement to be persuaded that their interests would be served by following suit. This is the "bald conscious parallelism" that is typical of interdependent industries. *See In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008).

Plaintiffs also argue that defendants' capacity to send text messages exceeded demand during the relevant period, and that price increases in a time of excess capacity support an inference of conspiracy. This argument is misplaced. The cases plaintiffs cite for this proposition involve manufacturers of tangible physical products such as computer chips, steel, and corn syrup. In such markets, where pricing is on a per-unit basis, economic theory suggests that the price of the individual unit of the good should be driven down by excess supply. Compl. ¶ 65; *High Fructose Corn Syrup*, 295 F.3d at 658. With text messaging, by contrast, a consumer's primary mode for realizing lower prices for text messaging services is to purchase a bulk package, not to obtain a lower price per individual message. Compl. ¶¶ 119-23. Defendants encourage this by offering a variety of packages, and plaintiffs do not allege price-fixing with regard to those packages. *Id.*

Furthermore, the "capacity" to which plaintiffs refer is, as plaintiffs describe it elsewhere in their complaint, the same infrastructure through which defendants transmit not just text messages but voice communications and data services such as Internet browsing. Compl. ¶¶ 3, 51, 62 & 69. Text messages are very small compared to voice mail, e-mail, music files, and other types of data that defendants transfer for subscribers — so much smaller that each text messaging file is "almost insignificant in the world of transmitting electronic data." Compl. ¶¶ 60-61.

The Court cannot infer a conspiracy based on plaintiffs' "excess capacity" contention because text messaging uses the same transmission mechanisms as other wireless services that require substantially more capacity. Plaintiffs have offered nothing to suggest that the defendants' overall capacity for all wireless transmissions exceeds demand to any significant extent. Further, plaintiffs note that defendants' prices for related products (such as data transmission, voice mail, and downloading music files) *have* decreased as capacity has increased. Compl. ¶ 69. Given all these circumstances, the economic theory that leads one to assume that the per-unit price of steel or corn syrup or widgets should decrease in times of oversupply is inapplicable in the present context.

5. Alternative explanations for defendants' behavior

In considering whether a plaintiff's factual allegations, considered as a whole, support a reasonable inference of conspiracy violative of the Sherman Act, *Twombly* instructs courts to consider the plausibility of "the suggestions raised by this conduct when viewed in light of common economic experience." *Twombly*, 550 U.S. at 565. As the Supreme Court's decision in *Iqbal* clarified to some extent, "the plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that the defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949. Facts that "are merely consistent with" a defendant's liability "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* If there is a "obvious alternative explanation" for defendants' conduct, such that it was likely explained by "routine market conduct," and "there was no need for joint encouragement," then a plaintiff's claim has not been "nudged . . . across the line from conceivable to plausible," and it is subject to dismissal. *Twombly*, 550 U.S. at 566-67, 570.

Plaintiffs themselves identify several reasons why defendants' conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal*, 129 S. Ct. at 1950. In the years since text messaging was first introduced in the U.S., use of the technology has increased exponentially, and it is expected that 3.3 trillion text messages will be sent in this country in 2009. Compl. ¶ 55. As the Court has noted, according to plaintiffs' complaint, most users of text messaging do not purchase text messages on an individual basis but instead buy bundled plans that come with a pre-determined or unlimited number of text messages. *Id.* ¶ 58. Defendants charge high prices for single-message texts to encourage users to purchase these bulk plans. *Id.* ¶¶ 119, 123.[2]

The increased use of bulk and unlimited text messaging plans also expands the number of potential users of CSCs, from which defendants stand to realize substantial revenue. Compl. ¶¶ 107, 109, 111. Advertisers and businesses use CSCs to communicate regularly with customers through frequent text messages. This approach uses too many messages and transmits too much data to appeal to a customer that pays for text messaging on a per-message basis, but it is potentially very appealing to those customers who purchase unlimited plans. *Id.* ¶¶ 118-22. Defendants earn revenue from the leasing of CSCs to advertisers and businesses, so they stand to gain financially if more people use these services, which they are more likely to do if they purchase bulk or unlimited text messaging plans.[3]

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[2] Plaintiffs do not allege that defendants do not compete on pricing for these bundled or unlimited plans.

[3] The fact that defendants, working together, have established policies governing the use of CSCs does nothing more than establish the existence of a joint venture from which all defendants stand to gain. The Court declines to draw a negative inference from allegations of "information sharing that result from defendants' participation in a concededly legal industry trade group." *In re Digital Music*, 592 F. Supp. 2d at 443.

Furthermore, as plaintiffs note in their complaint, defendants do compete in pricing of other wireless services, including voice calling, data plans, and bundled text messaging packages. Plaintiffs allege that during the period of the alleged conspiracy, prices on these related products decreased. Compl. ¶ 81. Plaintiffs argue that competition in other products gives rise to an inference that non-competition on single-message pricing must result from a conspiracy, but the Court disagrees. This behavior is "not only compatible with, but indeed [is] more likely explained by lawful, unchoreographed free-market behavior." *Iqbal*, 129 S. Ct. at 1950.

The far more likely inference from Sprint-Nextel's price "leadership" is that it raised per-message prices to push more subscribers to purchase bundled calling and texting plans. The other defendants then acted in their own best interests and raised their rates to that same level to recoup profits they were not realizing on other products on which there was active price competition. The defendant companies had self-interested reasons to follow Sprint-Nextel's lead, and thus in the present circumstances, the court cannot reasonably infer an agreement not to compete from this "follow the leader effect." *Reserve Supply*, 971 F.2d at 53.

6. Summary

Taken together, plaintiffs' factual allegations do not give rise to more than the "mere possibility" of an agreement, which is insufficient to state a claim for conspiracy under the Sherman Act. *See Iqbal*, 129 S. Ct. at 1950. Plaintiffs contend that they have alleged non-competitive behavior. Though this behavior possibly could result from an agreement, it is more likely the result of independent decision-making in defendants' unilateral best interests. In the wireless communications industry, price competition is fierce for voice calling, data services, and bundled plans. Most consumers purchase test messaging services on a bundled or unlimited basis. Defendants charge consumers steep penalties for early termination of service contracts. Given these factors, parallel pricing in this single, relatively narrow part of the field in which they compete does not support a reasonable inference of an agreement not to compete.[4] In short, plaintiffs have failed to allege plausibly that defendants' conduct was anything other than "merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 558.

Conclusion

For the reasons stated above, the Court grants defendants' motion to dismiss [docket no. 66]. The Court will convert this to a final judgment of dismissal with prejudice unless plaintiffs seek leave to file, by January 8, 2010, an amended complaint stating a viable claim for relief.

/s/ MATTHEW F. KENNELLY
MATTHEW F. KENNELLY
United States District Judge

Date: December 10, 2009

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[4] The Court notes that plaintiffs have not asked to conduct limited discovery that might enable them to obtain otherwise unavailable facts to support the proposition that the defendants had a meeting or meetings at which they entered into an agreement. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085 (N.D. Cal. 2007); *see also, In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 26, 2011

Before

RICHARD A. POSNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 10-8037

IN RE: TEXT MESSAGING ANTITRUST LITIGATION.

APPEAL OF: VERIZON WIRELESS, *ET AL.*,
Defendants.

Petition for Interlocutory Appeal from the
United States District Court for the
Northern District of Illinois, Eastern Division.

MDL No. 1997, Case No. 08 C 7082 –
Matthew F. Kennelly, *Judge.*

ORDER

On January 12, 2011, defendants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

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* Circuit Judge Joel M. Flaum, Circuit Judge Ilana Diamond Rovner and Circuit Judge Ann Claire Williams did not participate in the consideration of this petition for rehearing.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 08 C 7082
MDL No. 1997
Judge Matthew F. Kennelly

IN RE TEXT MESSAGING ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs, by and through their undersigned counsel, allege as follows upon personal knowledge as to their own conduct, and upon information and belief as to all other matters:

NATURE OF THE ACTION

1. This is an antitrust action charging Defendants with entering into and implementing a continuing contract, combination, and conspiracy to fix, raise, maintain, and stabilize prices for Text Messaging Services sold in the United States.

2. Plaintiffs bring this action on behalf of themselves and all persons or entities who purchased Text Messaging Services based on a fee per text message in the United States directly from Defendants or their predecessors, subsidiaries, or affiliates during the period from January 1, 2005 through the present.

3. Defendants control more than 90% of the market for Text Messaging Services. It costs a fraction of a penny for Defendants to transmit a text message

because these messages involve very little data and are transmitted on existing cellular network connections. Because the per unit cost of text messages is very low, reduced pricing would be an easy and affordable way for any one of the Defendants to distinguish itself from its competitors.

4. That is, in fact, what the Defendants traditionally did. In the 3rd Quarter of 2003, for example, while Nextel (the predecessor to Defendant Sprint-Nextel) and Cingular (the predecessor to Defendant AT&T) were charging their customers ten cents per text, Defendant T-Mobile charged only five cents. When Nextel increased its per-text rate to fifteen cents in the following quarter (the 4th Quarter of 2003), the others stood firm, with Cingular still charging only ten cents per text and T-Mobile still charging only five cents. Each continued to impose their independent charges for more than a year, with no changes until 2005.

5. In 2005, however, the Defendants started to align their per-text charges. Nextel, Cingular and Verizon each charged the identical ten-cent amount per text, and by the 2nd Quarter of 2006, T-Mobile joined them in charging ten cents. This was followed by more lockstep price increases. Sprint-Nextel Corporation increased its per text message price by 50% (from ten to fifteen cents) in the 4th Quarter of 2006, and immediately thereafter, in the 1st and 2nd Quarters of 2007, the remaining Defendants increased prices by the same exact amount (from ten to fifteen cents). Once again, in the 4th Quarter of 2007, Sprint-Nextel Corporation increased its per text message price by 33.33% (from fifteen to twenty cents), and immediately thereafter, in the 1st and 3rd Quarters of 2008, the remaining Defendants

increased prices by the same exact amount (from fifteen to twenty cents). Not one Defendant attempted to attract additional customers by charging even a penny less per text message.

6. Such marked shifts in behavior, where there are "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason," support the existence of a conspiracy. *See In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1094 (N.D. Cal. 2007) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.4 (2007)).

7. During the period from 2005 through 2008, as the cost to transmit a text message decreased by 65%, each Defendant increased its per unit prices by 100% in two identical price increases, to the same exact penny in similar time frames.

8. Text message pricing naturally lends itself to collusion because it is a uniquely homogenous form of wireless communication and because per unit text message prices can easily be severed from other service charges. Defendants' per unit text message prices are also available on the Internet. Further, each Defendant belongs to the CTIA – The Wireless Association and the Groupe Speciale Mobile Association, which provided Defendants with multiple opportunities to collude regarding pricing data during the period from 2005 through 2008.

9. It is implausible to think that each Defendant was able to independently arrive at the same exact price increase to the same exact penny within similar time frames. Each Defendant has millions of customer accounts and operates nationwide. Each price increase required each Defendant to undertake com-

prehensive software and other changes to nationwide accounting and billing systems. Each Defendant had to change or adjust print, television, radio and internet advertising and marketing campaigns that are nationwide in scope. Each Defendant had to prepare for and roll out training materials for sales associates and retail store locations and customer service representatives around the nation, if not the globe. Despite the comprehensive and multi-faceted efforts necessary for each Defendant to implement its price increase, they each were somehow able to implement the same exact price increase to the same exact penny within similar timeframes not once, but twice.

10. When Congress subpoenaed Defendants concerning the economically irrational price increases for per-unit text message services, Defendants largely refrained from addressing their per unit prices, focusing instead on text message service plans, and failed to deny that their per-text message prices were the result of collusion.

11. As a result of Defendants' anticompetitive conduct, Plaintiffs and members of the proposed class have paid Defendants higher prices for Text Messaging Services than they would have paid absent Defendants' antitrust conduct.

DEFINITIONS

12. "Class Period" means the period from January 1, 2005 through the present.

13. "Person" means any individual, partnership, corporation, association, or other business or legal entity.

14. "Text Messaging Services" or "Texting" means the use of a cellular telephone to send a character

message, usually through the use of a cellular telephone keypad, to another person.

JURISDICTION & VENUE

15. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover injunctive relief, treble damages, and costs of suit, including attorneys' and expert fees and costs, as a result of Defendants' violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

16. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

17. This court has personal jurisdiction over each Defendant because, *inter alia*, each: (a) transacted business throughout the United States, including in this District; (b) provided, sold and delivered substantial Text Messaging Services throughout the United States, including in this District; (c) had substantial contacts with the United States, including in this District; and (d) was engaged in an illegal scheme and price-fixing conspiracy that was directed at, and had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the United States, including in this District.

18. Venue is proper in this District pursuant to 15 U.S.C. §§ 15(a) and 22, and 28 U.S.C. § 1391(b) and (c) because during the Class Period each Defendant resided, transacted business, was found, or had agents in this District, and because a substantial part of the events giving rise to the claims occurred in this District.

19. Venue is also proper in this District because this action was transferred to this District by the

Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a).

PLAINTIFFS

20. Aircraft Check Services Company is an Illinois corporation that purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

21. Nicholas Iltsopoulos is a resident of Titusvile, Florida who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

22. David Keefer is a resident of Wantagh, New York who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

23. Kevin Konkel is a resident of South Milwaukee, Wisconsin who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

24. Jim Morris is a resident of Athens, Alabama who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

25. Premiere Investment Consulting is a resident of Cudahy, Wisconsin that purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

26. Melissa Leigh Randolph is a resident of West Palm Beach, Florida who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

27. Elizabeth Smith is a resident of Milwaukee, Wisconsin who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

DEFENDANTS

28. Defendant Verizon Wireless ("Verizon") is a joint venture of Verizon Communications (55%) and Vodafone Group PLC (45%) with its principal place of business in Basking Ridge, New Jersey. By subscribers, Verizon Wireless owns and operates the largest United States wireless telecommunications network with approximately 87 million United States subscribers and an annual revenue of approximately $44 billion in 2007.

29. On or about January 9, 2009, Verizon Wireless acquired Alltel Wireless, the fifth largest United States provider of wireless services, for approximately $28.1 billion.

30. Verizon Communications and Verizon Wireless are referred to in this complaint collectively as "Verizon."

31. Defendant AT&T Mobility L.L.C. ("AT&T Mobility" or "AT&T") is a Delaware corporation with its principal place of business at 5565 Glenridge Connector, Atlanta, Georgia 30342. It is the second largest United States provider of wireless services with approximately 78 million subscribers and 2007 revenues of approximately $43 billion.

32. Defendant Sprint Nextel Corporation is a public corporation with its principal place of business at 650 Sprint Parkway, HL-5A STX, Overland Park, Kansas 66251. It is the third largest United States provider of wireless services with approximately 49 million subscribers.

33. Defendant T-Mobile USA, Inc. is a Delaware corporation with its principal place of business at 12920 SE 38th Street, Bellevue, Washington 98006. It is the fourth largest United States provider of

wireless services with approximately 33 million subscribers.

34. Each of the named Defendants sold Text Messaging Services in the United States directly or through its affiliates and/or subsidiaries after January 1, 2005.

35. Each Defendant acted as the agent or joint venturer of or for the other Defendants with respect to the acts, violations and common course of conduct alleged herein.

CO-CONSPIRATORS

36. Various others, presently unknown to Plaintiffs, participated as co-conspirators in the violations alleged in this complaint and performed acts and made statements in furtherance thereof.

37. The acts charged in this complaint have been done by Defendants and their co-conspirators or were authorized, ordered or done by their respective officers, agents, employees, or representatives while actively engaged in the management of each Defendant's business or affairs.

CLASS ACTION ALLEGATIONS

38. Plaintiffs bring this action under Federal Rule of Civil Procedure 23(a), (b)(1)(A), (b)(2) and (b)(3) on behalf of themselves and the following Class:

> All persons and entities who paid a per message price for Text Messaging Services in the United States directly to one or more of the Defendants or their affiliates or subsidiaries at any time from January 1, 2005 to the present. The Class excludes government entities, Defendants, and Defendants' parents, affiliates, subsidiaries, officers and directors.

39. Plaintiffs do not know the exact number of Class members because that information is within the exclusive control of Defendants, but believe that there are many millions geographically dispersed throughout the United States, such that joinder of all members would be impracticable.

40. The identities of Class members can be readily determined from records maintained by Defendants and their agents.

41. Questions of law or fact common to Class members exist and predominate over any questions affecting individual members of the Class, and include:

a. Whether Defendants engaged in a contract, combination or conspiracy to raise, fix, stabilize or maintain the per message price for Text Messaging Services in the United States;

b. Whether each Defendant engaged in the contract, combination or conspiracy, and if so, to what extent;

c. Whether the contract, combination or conspiracy violates Section 1 of the Sherman Act;

d. Whether there were any additional co-conspirators to the contract, combination or conspiracy, and if so, their identities;

e. The duration and extent of the contract, combination or conspiracy;

f. Whether the conduct of Defendants and their co-conspirators caused the per message price of Text Messaging Services to be artificially inflated to anti-competitive levels;

g. Whether Plaintiffs and Class members were injured by the conduct of Defendants and their co-conspirators;

h. The appropriate classwide measure of damages; and

i. Whether Plaintiffs and the Class are entitled to injunctive relief.

42. Plaintiffs have claims that are typical of the claims of the Class, have no interests adverse to or in conflict with the Class, and will fairly and adequately protect the interests of the Class.

43. Plaintiffs have retained counsel who are experienced in antitrust class actions, have significant knowledge about the antitrust laws, have performed considerable work in identifying and investigating the potential claims in this action, and have committed significant resources to representing the Class.

44. Separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

45. Defendants have acted on grounds that apply generally to the Class, so that final injunctive relief is appropriate for the Class as a whole.

46. Prosecuting the case as a class action is superior to any other methods for fair and efficient adjudication of the controversy because class members have no interest in individually controlling the prosecution of separate actions, as individual prosecutions would be uneconomic, would impose heavy burdens on the parties and the courts, and would create a risk of inconsistent adjudications. In addition, all litigation concerning this controversy already has been centralized in this forum, and it is unlikely that there will be any significant difficulties in managing this case as a class action.

TRADE AND COMMERCE

47. During the Class Period, Defendants and their co-conspirators sold a substantial amount of Text Messaging Services within the continuous and uninterrupted flow of interstate and foreign commerce, and as intended, their actions substantially affected that commerce.

48. The wireless telephone industry has undergone consolidation in the past four years, with the number of major national competitors declining from six to four.

49. Defendants are the four largest wireless telecommunications companies in the United States, and with more than 225 million subscribers, they control more than 90 percent of the Text Messaging Services sold in the United States.

50. Thus, together, Defendants have great power in the market for Text Messaging Services and are capable of combining to increase the market price for those services to supra-competitive levels.

TEXT MESSAGE SERVICES AND COSTS

51. Text messaging involves the use of cellular telephone equipment to send and receive short messages, generally limited to 160 characters per message.

52. Text messaging constitutes a relevant market, and there are no good substitutes for text messaging.

53. Customers sent 363 billion text messages in 2007, resulting in annual text messaging revenues of about $23.2 billion.

54. By 2008, Defendants transmitted 2.5 trillion text messages for almost 263 million wireless subscribers in the United States, representing 84% of the total population of the United States.

55. It is estimated that 3.3 trillion text messages will be sent in 2009.

56. AT&T has estimated that approximately two percent of the text messages sent and received on its system were purchased on a per-message basis, while approximately ten percent of T-Mobile's customers' text messaging is conducted on a per-message basis

57. Assuming that at least two percent of the 2.5 trillion text messages that were sent and received in 2008 were purchased on a per-message basis, resulting in 50 billion text messages being sent and received at twenty cents each, Defendants' joint per-text-message revenue for the year 2008 alone would have been $10 billion.

58. While some subscribers purchase text messaging plans that allow them to send or receive a set or unlimited number of text messages for a flat monthly fee, many others pay an individual fee for each text message.

59. Defendants charge fees not only for outgoing messages, but also for incoming messages received by the subscriber, resulting in a fee being paid to a Defendant twice for each message – once when the message is sent, and once when it is received.

60. Text message files are exponentially smaller than voicemail, e-mail and music download files, and it thus costs exponentially less to transmit them.

61. For example, 600 text messages contain less data than one minute of a telephone call, making each text messaging file almost insignificant in the world of transmitting electronic data.

62. Defendants' cost to deliver an individual text message is close to zero because it is transmitted on

an existing connection between a cell phone and the cell phone system.

63. Despite these minimal costs, carriers charge huge mark-ups and enjoy high profit margins on Text Messaging Services. According to technology news source CNET News: "One can easily assume that the mark-up on a text message *is several thousands times* what it actually costs carriers to transmit this little bit of data." (Emphasis added.)

64. The benefits of competition are lower prices and better services, and with competition, per unit prices should be closely related to and follow per unit costs.

65. Theoretically and historically, as per unit costs for an item substantially decrease, per unit prices for such item substantially decrease.

66. Between 2005 and late 2006 or early 2007, each Defendant's unit costs associated with text messages substantially decreased—by approximately 50%.

67. Absent collusion, Defendants' per unit prices for text messages should have substantially decreased as well.

68. Defendants already had the infrastructure to transmit many more text messages than they were transmitting (and presently do transmit). Because the supply of text messages was considerably greater than consumers' demand for them, Defendants' prices for text messaging should have decreased. Increasing prices during a period of oversupply is one of the leading indicators of a conspiracy.

69. From 2005 to early 2007, the price of other wireless services provided by Defendants *decreased*. In fact, the same infrastructure that enables Defen-

dants to transmit text messages enables them to transmit other wireless services. The factors that govern the decreasing costs of text messaging also govern the decreasing costs of those other wireless services. Defendants' prices for text messaging should have decreased between 2005 and late 2006 or early 2007.

70. However, Defendants' per unit prices for text messages did not decrease by 50% over this period. In fact, no Defendant's price for per unit text messaging decreased at all.

71. On the contrary, each Defendant engaged in the highly unusual conduct of increasing per unit text messaging prices.

72. Indeed, each and every Defendant engaged in the exact same, highly anomalous behavior of increasing its text messaging prices by an astounding 50%.

73. Specifically, by the 2nd Quarter of 2006, each Defendant charged ten cents per each text message sent or received. In late 2006 and early 2007, each Defendant increased the per message fee by 50% from ten to fifteen cents as outlined in the following chart:

Defendant	Price Increase from 10¢ to 15¢
Sprint-Nextel Corp.	4th Q 2006
AT&T	1st Q 2007
Verizon Wireless	1st Q 2007
T-Mobile USA	2nd Q 2007

74. During 2007 and early 2008, the amount of text messages sent by each Defendant's customers greatly increased. *See* ¶¶ 49-51 above.

75. During this same period, the per unit costs of text messages of each Defendant continued to decrease substantially, by at least 35%, and each Defendant's available supply to transmit text messages still far exceeded usage and demand. Also, each Defendant then decreased its per unit prices for other wireless services.

76. Moreover, each Defendant selected the exact same, extremely substantial 33.33% increase in its prices. Specifically, each Defendant increased the per message fee from fifteen cents to twenty cents as outlined below:

Defendant	Price Increase from 15¢ to 20¢
Sprint-Nextel Corp.	4th Q 2007
AT&T	1st Q 2008
Verizon Wireless	1st Q 2008
T-Mobile USA	3rd Q 2008

77. Sprint-Nextel was the ringleader in all price increases. Before the alleged conspiracy, no one followed when Nextel (now Sprint-Nextel) first tried to increase the per-text price from ten to fifteen cents in the 4th Quarter of 2003. Rather, Cingular (now AT&T) stood firm at ten cents, and T-Mobile stood firm at five cents, and this continued for more than a year, until 2005. In fact, in this competitive environment, Nextel was forced to return its per-text rate to the earlier ten cents in the 1st Quarter of 2005.

78. After the alleged conspiracy, however, the other Defendants followed Sprint-Nextel's per-text

price increases. Verizon and AT&T did so immediately, in the very next quarter for both increases, and T-Mobile ultimately cooperated and followed the increase.

79. Compared to historical experience, economic theory, Defendants' own contemporaneous pricing of comparable products, Defendants' excess supply, and Defendants' low costs, the prices of text messaging services should have decreased substantially between 2005 and 2008.

80. However, Defendants' collusive behavior subsequently caused a 100% increase in per unit text messaging prices paid by Plaintiffs at the same times that each Defendant's comparable costs have decreased by approximately 65%, Defendants' supply has exceeded demand, and the prices of Defendants' related products have decreased.

81. Text messaging per unit pricing lends itself to collusion in many ways. This is, in part, because text messaging is a uniquely homogeneous form of wireless communication. The per-text-message price can easily be severed from other service charges, separately observed, and openly communicated among Defendants. Defendants, in fact, did systematically engage in a highly unusual degree of communication with one another and shared information during 2005 – 2008. *See infra.* Defendants' prices for text messaging are even available on the Internet.

82. Given the circumstances hereinafter and previously alleged, the dramatic, identical rise in the price of text messaging must have resulted from a price fixing conspiracy among the Defendants.

83. In the alternative, under the circumstances hereinafter and previously alleged, Defendant Sprint-Nextel Corp.'s astonishing price increases

constituted offers to the other Defendants to avoid engaging in competition and to extract supra-competitive prices many thousand times each Defendant's costs for text messaging services. The other Defendants accepted Sprint-Nextel's offers when they implemented identical price increases shortly thereafter, thereby consummating illegal agreements among suppliers representing 90% of the text message market to raise and maintain prices.

84. Under these circumstances, Defendants' pattern of offers and acceptances in and of itself constitutes a price fixing conspiracy.

CONGRESSIONAL INVESTIGATION

85. On September 9, 2008, the Senate Antitrust Subcommittee sent a letter to Defendants, questioning the basis for the huge increases in the pay-per-use text messaging price.

86. The Senate Subcommittee expressed concern about the increases being made at nearly the same time, in identical amounts, when price increases did not appear to be justified by increases in costs, and concluded that "[t]his conduct is hardly consistent with the vigorous price competition we hope to see in a competitive marketplace."

87. The Senate Subcommittee also requested that each Defendant:

a. explain the cost, technical or other factors that justify a 100% increase in the cost of Text Messaging Services from 2005 to 2008;

b. provide data on the use of Text Messaging Services from 2005 to 2008;

c. provide a comparison of prices charged for Text Messaging Services as compared to other services offered by the company such as prices per minute for voice calling, prices for sending emails, and prices charged for data services such as internet access over wireless devices from 2005 to the present; and

d. state whether the company's Text Messaging Services pricing structure differs in any significant respect from the pricing of the company's three main competitors.

88. In response, Defendants provided limited and biased information on the prices for their package plans, including their text message package plans, but failed to (a) specifically address why they increased their per-message prices for text messaging or (b) deny that those increases were the result of collusion.

OPPORTUNITY TO CONSPIRE THROUGH TRADE ORGANIZATIONS

89. CTIA-The Wireless Association ("CTIA") is a trade organization based in Washington, D.C. that claims to be an "international association for the wireless telecommunications industry, dedicated to expanding the wireless frontier."

90. Defendants are currently members of CTIA. Defendants have met regularly through the CTIA's biannual conventions since 2002.

91. In 2001, AT&T launched the first inter-carrier text messaging service, which allowed users to send text messages to customers of other carriers.

92. Following on the heels of AT&T's launch, Defendants AT&T, Sprint Nextel and Verizon met through the CTIA on numerous occasions to discuss pricing and text messaging.

93. For example, shortly thereafter, in early 2002, under CTIA's guidance, the six major national carriers, including Defendants, announced that they had

reached agreement on allowing each carrier's service for text messaging to communicate with the others' service.

94. Based on its orchestration of the interoperability agreements in 2002, CTIA has been and remains the driving force behind organizing Defendants and exchanging information about text messaging in the United States.

95. In announcing the interoperability agreements and potential massive revenue to carriers, CTIA President and CEO Tom Wheeler was quoted as saying, "Text messages have not only given consumers a brand new way to communicate, it has also given wireless companies around the globe an important new revenue stream. Last year, the revenue generated by text messages was greater than Hollywood's combined box office receipts, according to the Mobile Data Association in the U.K."

96. The CTIA has expressed concerns that its collection of data could contribute to anti-competitive endeavors, but it has nonetheless continued to track competitive data, and has in fact increased its collection of information on texting.

97. CTIA has a Wireless Internet Caucus ("WIC") which is a "core community of CTIA member companies dedicated to growing a large and robust market at the convergence of wireless and Internet technologies, products and services" and that "seek[s] to build a shared vision of this market and an action plan to enable its rapid growth."

98. CTIA's WIC committee structure includes a Leadership Council, which "comprises a critical mass of key industry decision makers who work together to create a shared market vision and unified approach to solving problems and challenges faced collectively

growing the wireless data marketplace," and currently counts among its members representatives from AT&T Mobility, Sprint Nextel, T-Mobile USA, and Verizon Wireless.

99. The WIC Leadership Council held its inaugural meeting in mid-February 2002, which was attended by the six top providers, including Defendants AT&T, Sprint and Verizon, as well as other industry suppliers and vendors. The meeting was a day-long event in which planning sessions were reportedly designed to discuss impediments to success in a variety of areas, including messaging services, interoperability, and billing.

100. The WIC Leadership Council, on information and belief, convenes biannually in face-to-face exchanges and holds quarterly telephone conferences. During the biannual Leadership Council meetings, the Defendants had an opportunity to conspire to set pricing for Text Messaging Services. Sprint-Nextel announced a per text message price increase within approximately a month after the mid-year meeting in 2006, and within approximately a month after the mid-year meeting in 2007, and as described above, the other Defendants followed shortly thereafter with identical price increases.

101. The CTIA also formed a Mobile Advertising Metrics Action Team comprised of wireless carriers that work together to agree to minimum standards for reporting metrics, targeting information, advertising inventory and consumer privacy, and to monitor the progress of other industry organizations and collaborate where appropriate.

ADDITIONAL JOINT CONDUCT

102. The CTIA, of which Defendants are members, established and controls the Common Short Code

Association (CSCA). Defendants, working together through the CTIA, collusively use the CSCA to expand the market for texting services, control the prices for texting services, and generate further demand for texting services at the excessive prices established by the Defendants.

103. Common Short Codes ("CSCs") are five-digit or six-digit numeric codes to which text messages can be addressed from a wireless device. They are easy to remember, compatible across all participating carriers, and can be leased by anyone interested in interacting with over 200 million wireless consumers.

104. Wireless subscribers send text messages to Short Codes to access a wide variety of mobile content for delivery to their wireless devices, such as sweepstakes, tele-voting campaigns, mobile coupons, other promotions, and a wide range of additional interactive wireless services.

105. Marketers of consumer products and services, as well as business and enterprise customers, are currently using Short Codes to directly interact with and attract various audiences, as Short Codes provide an unprecedented opportunity to engage customers anytime, anywhere.

106. According to the CSCA, "The potential is enormous. Common Short Codes will enable the continued growth of text messaging and provide a platform upon which new technologies will be able to flourish. Market developments like picture messaging (or MMS) and the continued evolution of Instant Messaging into the wireless medium make text messaging one of the most exciting, yet simple, breakthroughs, since the advent of the telephone itself!"

107. The CSCA leases the Short Codes to advertisers, which then negotiate agreements with each carrier to carry their Short Codes.

108. The CSCA admits that its control of the Short Codes is a substantial benefit: "Wireless Service Providers benefits: Drives up text messaging usage and revenues because more applications will be funded."

109. Through the CSCA, CTIA has created the "shared vision" of the WIC by going beyond the bounds of a trade organization into the business of generating and driving profits for its members, including its core members, the named Defendants.

110. Short Codes earn money for the Defendants in a number of ways: the Defendants' trade association consortium charges a set fee for the establishment and leasing of Short Codes; then the lessee of the Short Code pays each carrier for the right to carry its codes; and consumers are then charged for using the Short Code, sometimes in multiple ways.

111. For example, Major League Baseball has leased the Short Code 65246 "MLBGO" at http://mobile.mlb.com/web, which provides the subscriber with sports alerts, Ringtones, and wallpaper. One of the options offered is "Team Alerts" where, for $3.99 "plus standard messaging fees," a subscriber can "stay connected" to his or her favorite team. The fan receives fifteen to twenty alerts per week, including game summaries, home runs, lead changes, breaking news, and video highlights. Major League Baseball says "To avoid high carrier data charges, an unlimited data plan is strongly recommended." Defendants receive a share of the monthly fee for alert systems and their charges for the services, and for these types of services and revenues, they need a

large group of subscribing customers with unlimited data plans.

112. The Groupe Speciale Mobile Association ("GSMA") is a worldwide trade group of cellular providers that boasts membership of 750 mobile networks across 219 countries that collectively serve more than 3.4 billion customers totaling 85% of the world's mobile phone users.

113. One of the GSMA member-only databases includes information such as effective price per minute, total billed for SMS events, and number of SMS messages per user per month.

114. GSMA recently completed its annual "Mobile World Congress" that was attended by at least leaders from AT&T and Verizon Communication.

115. One of the break-out sessions at that "Congress" pertained to "Pricing Strategies for the Unlimited Generation."

116. Through CTIA and GSMA, the defendants have a forum in which to interact, access relevant utilization and pricing data, and participate in committees to lobby governmental entities, which furthers their collusive efforts.

117. The revenues of Defendants are dependent on encouraging individual users to use and become reliant upon high amounts of data.

118. Defendants, individually and acting in concert, have adopted uniform and unreasonably high charges for text messaging in order to encourage their customers to purchase other services.

119. Defendants stand to earn significant fees from the use of Short Codes, and if they are to fulfill their potential as a revenue driver, customers need

to have unlimited text messaging and related data plans.

120. The larger the group of potential customers equipped with unlimited plans, the more fees Defendants can demand for the right to carry their short codes.

121. Consequently, it is necessary for Defendants to enroll as many customers as possible in unlimited data plans.

122. Defendants, acting jointly, in concert, and individually, also have adopted high single text only plans in order to encourage and force their texting customers to purchase unlimited data plans and other bundled services that the individual consumers may not want, need, or be able to afford.

STRUCTURAL FACTORS FACILITATE COLLUSION

123. The wireless telephone-provider industry is marked by certain structural and other characteristics that make price fixing feasible, including the heavy concentration of the market share among Defendants.

124. Price fixing is relatively easy to maintain in a market such as that for Text Messaging Services, which has extremely high barriers to entry because of the high cost of infrastructures, creating a situation where there is virtually no chance that a new competitor will enter the market to challenge artificially high prices.

125. Collusion among competitors in this market is also easy because Text Messaging Services are homogenous, with no discernable difference between the Text Messaging Services provided by one market participant over another.

126. Defendants have colluded on the inclusion of other terms in their cellular and text messaging contracts, in relation to early termination fees and mandatory arbitration clauses, leaving consumers with no choice but to accept these terms or forego purchasing cellular and text messaging services.

COMMON CLASS ARBITRATION WAIVERS

127. Defendants require that Plaintiffs and other Class Members agree to contracts which require wireless users to arbitrate disputes with service providers and to waive their right to class arbitration. These common waivers are indicative of additional collusive, anticompetitive conduct and are specifically designed to facilitate Defendants' conspiracy.

128. As Defendants know, due to the high cost of litigation and the comparatively small injury an individual user suffers from their conspiracy, it is only economically feasible for the individual to seek redress by joining a class action. Common class arbitration waivers constitute an attempt by Defendants to insulate themselves from legal challenge on a class-wide basis, enabling them to reap substantial profits from the collective injury they impose on users.

129. Plaintiffs and other Class Members who have submitted to class arbitration waivers have done so because it is extremely difficult to function in the current economic and social climate without Text Messaging and wireless services. In addition, such Plaintiffs and other Class Members have no bargaining power, do not understand the consequences of a class arbitration waiver, and may be unsophisticated. For the foregoing reasons, the class arbitration waiver is a classic contract of adhesion and is unconscionable and unenforceable.

130. Moreover, Defendants acknowledge that these class arbitration waivers are of questionable validity, as their contracts make provisions for what will happen when a court determines that the waivers are unenforceable or void. Under those circumstances, the contracts state that the overarching agreement to arbitrate is itself void. As the class arbitration waivers at issue are unenforceable, and as the overarching agreements to arbitrate are consequently void pursuant to contract, Plaintiffs have properly brought this litigation in this Court on behalf of themselves and the Class.

VIOLATION OF SECTION 1 OF THE SHERMAN ACT

131. Plaintiffs re-allege paragraphs 1 through 129 as if fully restated herein.

132. Beginning at least as early as January 1, 2005 (the exact date being unknown to Plaintiffs) and continuing until the present, Defendants and their co-conspirators engaged in a contract, combination and conspiracy to artificially raise, fix, maintain and/or stabilize pricing for Text Messaging Services in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

133. Defendants entered into illicit agreements to increase prices of Text Messaging Services at some point prior to and during the period around July-December 2006 (for the increase implemented in Q4 2006-Q2 2007) and again at some point prior to and during the period around July-December 2007 (for the increase implemented in Q4 2007-Q3 2008).

134. For the purpose of formulating and carrying out the contract, combination and conspiracy, Defen-

dants and their co-conspirators did those things which they conspired to do, as alleged above.

135. The contract, combination and conspiracy alleged had the following effects, among others:

a. purchasers of Text Messaging Services have been and continue to be deprived of the benefit of free and open competition;

b. the per text message price has been and continues to be fixed, raised, maintained and stabilized at artificially high and non-competitive levels; and

c. competition between and among Defendants and other co-conspirators in the sale of Text Messaging Services has been and continues to be unreasonably restrained.

136. Plaintiffs and the other Class members have been injured in their business and property by being unable to purchase text messages on a per message basis, except at a price higher than otherwise would have been paid in the absence of Defendants' unlawful contract, combination and conspiracy.

137. The contract, combination, and conspiracy is continuing, and will continue unless the injunctive relief prayed for herein is granted.

138. Plaintiffs and the Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

A. That the Court determine that the Sherman Act claim may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure;

B. That the Court adjudge and decree that Defendants engaged in an unlawful contract, combination and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1);

C. That the Court adjudge and decree that each of the Defendants, its subsidiaries, successors, transferees, assigns, and respective officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from directly or indirectly continuing, maintaining or renewing the contract, combination and conspiracy alleged herein, and from engaging in any other contract, combination and conspiracy, agreement, understanding or concert of action having a similar purpose or effect;

D. That Plaintiffs and the other Class Members recover threefold the damages that each sustained;

E. That Plaintiffs and the other Class Members recover the costs of the suit, including reasonable attorneys' and expert fees and costs;

F. That Plaintiffs and the other Class Members be awarded pre-judgment and post-judgment interest at the highest legal rate from and after the date of service of the initial complaints to the extent provided by law; and

G. That the Court grant such other, further or different relief as may be just.

JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury for all issues so triable.

Dated: October 16, 2009 Respectfully submitted,

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Plaintiffs' Steering Committee

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 08 C 7082
MDL No. 1997
Judge Matthew F. Kennelly

IN RE TEXT MESSAGING ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs, by and through their undersigned counsel, allege as follows upon personal knowledge as to their own conduct, and upon information and belief as to all other matters:

NATURE OF THE ACTION

1. This is an antitrust action charging Defendants with entering into and implementing a continuing contract, combination, and conspiracy to fix, raise, maintain, and stabilize prices for Text Messaging Services sold in the United States.

2. Plaintiffs bring this action on behalf of themselves and all persons or entities who purchased Text Messaging Services based on a fee per text message in the United States directly from Defendants or their predecessors, subsidiaries, or affiliates during the period from January 1, 2005 through the present.

3. Defendants control more than 90% of the market for Text Messaging Services. It costs a fraction of a penny for Defendants to transmit a text message

because these messages involve very little data and are transmitted on existing cellular network connections. Because the per-unit cost of text messages is very low, reduced pricing would be an easy and affordable way for any one of the Defendants to distinguish itself from its competitors.

4. That is, in fact, what the Defendants traditionally did. In the 3rd Quarter of 2003, for example, while Nextel (the predecessor to Defendant Sprint Nextel) and Cingular (the predecessor to Defendant AT&T) were charging their customers ten cents per text, Defendant T-Mobile charged only five cents. Alltel (later acquired by Defendant Verizon) vacillated between five, eight, and ten cents. At the same time, Verizon followed a unique pricing model, charging disparate fees of two cents for incoming messages and ten cents for outgoing messages. When Nextel increased its per-text rate to fifteen cents in the following quarter (the 4th Quarter of 2003), the other Defendants stood firm, with Cingular and Alltel still charging only ten cents per text, T-Mobile still charging only five cents per-unit, and Verizon continuing to follow the unique pricing structure described above. Each continued to impose their independent charges for more than a year, with no changes until 2005. Then in the 1st Quarter of 2005, Sprint Nextel dropped its charge to ten cents per text, while Alltel increased its per-unit charge to eight cents.

5. The conspiracy began after this unsuccessful attempt to increase prices independently. In 2005 and 2006, the Defendants agreed to adopt a uniform and unprecedented common per-unit price of ten cents for text messaging services. With Cingular charging ten cents per text, and Sprint Nextel having dropped its per-unit fee to an identical ten cent level,

T-Mobile and Alltel increased their per-unit rates to ten cents and Verizon joined them by abandoning its unique pricing model in favor of charging an identical ten cents per-unit for all incoming and outgoing messages.

6. This was followed by more lockstep price increases. Sprint Nextel Corporation increased its per text message price by 50% (from ten to fifteen cents) in the 4th Quarter of 2006, and immediately thereafter, in the 1st and 2nd Quarters of 2007, the remaining Defendants increased prices by the same exact amount (from ten to fifteen cents).

7. Once again, in the 4th Quarter of 2007, Sprint Nextel Corporation increased its per text message price by 33.33% (from fifteen to twenty cents), and immediately thereafter, in the 1st and 3rd Quarters of 2008, the remaining Defendants increased prices by the same exact amount (from fifteen to twenty cents). Not one Defendant attempted to attract additional customers by charging even a penny less per text message.

8. Such marked shifts in behavior, where there are "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason," support the existence of a conspiracy. *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 900 (N.D. Ill. 2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.4 (2007)).

9. During the period from 2005 through 2008, as the cost to transmit a text message decreased by 65%, each Defendant first aligned its per-unit price at ten cents, and subsequently increased its per-unit prices by 100% in two identical price increases, to the same exact penny in similar time frames.

10. Text message pricing naturally lends itself to collusion because it is a uniquely homogenous form of wireless communication and because per-unit text message prices can easily be severed from other service charges. Defendants' current per-unit text message prices are also available on the Internet. Further, each Defendant belongs to the CTIA – The Wireless Association and the Groupe Speciale Mobile Association, which provided Defendants with multiple opportunities to collude regarding pricing data from before 2005 to date.

11. The CTIA was one vehicle for conducting the conspiratorial activity, as revealed in several CTIA press releases and public documents. The CTIA created the Wireless Internet Caucus ("WIC") Leadership Council consisting of "the dominant forces in wireless data," including "representatives from the top six wireless carriers (AT&T Wireless Services, Cingular Wireless [later AT&T], Nextel, Sprint PCS, Verizon Wireless and VoiceStream Wireless [later renamed T-Mobile])."[1] The purpose of the WIC Leadership Council was to create "industry-wide approach[es]" to "messaging" and billing." Unlike run-of-the-mill annual meetings conducted by various trade associations, the WIC Leadership Council entailed committee meetings narrowly focused on text messaging delivery and pricing, and included the participation of Defendants' high-level executives.

12. The WIC Leadership Council also attempted to "create industry-wide solutions through '**co-opetition**'

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[1] Feb. 26, 2002 CTIA Press Release, *CTIA Convenes Wireless Internet Caucus Leadership Council; Introducing "A New Day" of Wireless Internet Industry Development*, available at http://investor.infospaceinc.com/releasedetail.cfm?ReleaseID=166787.

with each other,"[2] and focused on "build[ing] a shared future in which we can all look forward to **profiting together**"[3] by placing the interests of the industry above and before the individual companies' individual interests.[4]

13. It is implausible to think that each Defendant was able to independently arrive at the same exact price increase to the same exact penny within similar time frames considering the extensive exchanges of information engaged in by Defendants pertinent to messaging revenue, billing, and delivery. Each Defendant has millions of customer accounts and operates nationwide. Each price increase required each Defendant to undertake comprehensive software and other changes to nationwide accounting and billing systems. Each Defendant had to change or adjust print, television, radio and internet advertising and marketing campaigns that are nationwide in scope. Each Defendant had to prepare for and roll out training materials for sales associates and retail store locations and customer service representatives around the nation, if not the globe. Despite the comprehensive and multi-faceted efforts necessary for each Defendant to implement its price increase, they each were somehow able to implement the same exact price increase to the same exact penny within similar timeframes not once, but twice.

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[2] March 5, 2003 CTIA Press Release, *Wireless Internet Caucus to Expand*, available at http://www.ctia.org/media/press/body.cfm/prid/1228.

[3] The Wireless Internet Caucus (WIC) of CTIA-The Wireless Association™ Presents The WIC Manifesto, at 2.

[4] Feb. 26, 2002 CTIA Press Release, *supra*.

14. When Congress subpoenaed Defendants concerning the economically irrational price increases for per-unit text message services, Defendants largely refrained from addressing their per-unit prices, focusing instead on text message service plans, and failed to deny that their per-text message prices were the result of collusion.

15. As a result of Defendants' anticompetitive conduct, Plaintiffs and members of the proposed class have paid Defendants higher prices for Text Messaging Services than they would have paid absent Defendants' antitrust conduct.

DEFINITIONS

16. "Class Period" means the period from January 1, 2005 through the present.

17. "Person" means any individual, partnership, corporation, association, or other business or legal entity.

18. "Text Messaging Services" or "Texting" means the use of a cellular telephone to exchange brief messages with other mobile phones over cellular networks, and may include *inter alia* person-to-person messaging and message interaction with automated systems to order products and services for mobile phones or to participate in contests.

JURISDICTION & VENUE

19. Plaintiffs bring this action under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover injunctive relief, treble damages, and costs of suit, including attorneys' and expert fees and costs, as a result of Defendants' violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

20. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

21. This court has personal jurisdiction over each Defendant because, *inter alia*, each: (a) transacted business throughout the United States, including in this District; (b) provided, sold and delivered substantial Text Messaging Services throughout the United States, including in this District; (c) had substantial contacts with the United States, including in this District; and (d) was engaged in an illegal scheme and price-fixing conspiracy that was directed at, and had the intended effect of, causing injury to persons residing in, located in, or doing business throughout the United States, including in this District.

22. Venue is proper in this District pursuant to 15 U.S.C. §§ 15(a) and 22, and 28 U.S.C. § 1391(b) and (c) because during the Class Period each Defendant resided, transacted business, was found, or had agents in this District, and because a substantial part of the events giving rise to the claims occurred in this District.

23. Venue is also proper in this District because this action was transferred to this District by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a).

PLAINTIFFS

24. Aircraft Check Services Company is an Illinois corporation that purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

25. Nicholas Iltsopoulos is a resident of Titusvile, Florida who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

26. David Keefer is a resident of Wantagh, New York who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

27. Kevin Konkel is a resident of South Milwaukee, Wisconsin who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

28. Jim Morris is a resident of Athens, Alabama who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

29. Premiere Investment Consulting is a resident of Cudahy, Wisconsin that purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

30. Melissa Leigh Randolph is a resident of West Palm Beach, Florida who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

31. Elizabeth Smith is a resident of Milwaukee, Wisconsin who purchased Text Messaging Services from one or more of the Defendants after January 1, 2005.

DEFENDANTS

32. Defendant Verizon Wireless ("Verizon") is a joint venture of Verizon Communications (55%) and Vodafone Group PLC (45%) with its principal place of business in Basking Ridge, New Jersey. By subscribers, Verizon Wireless owns and operates the largest United States wireless telecommunications network with approximately 87 million United States

subscribers and an annual revenue of approximately $44 billion in 2007.

33. On or about January 9, 2009, Verizon Wireless acquired Alltel Wireless, the fifth largest United States provider of wireless services, for approximately $28.1 billion.

34. Verizon Communications and Verizon Wireless are referred to in this complaint collectively as "Verizon."

35. Defendant AT&T Mobility L.L.C. ("AT&T Mobility" or "AT&T") is a Delaware corporation with its principal place of business at 5565 Glenridge Connector, Atlanta, Georgia 30342. It is the second largest United States provider of wireless services with approximately 78 million subscribers and 2007 revenues of approximately $43 billion.

36. Defendant Sprint Nextel Corporation is a public corporation with its principal place of business at 650 Sprint Parkway, HL-5A STX, Overland Park, Kansas 66251. It is the third largest United States provider of wireless services with approximately 49 million subscribers.

37. Defendant T-Mobile USA, Inc. is a Delaware corporation with its principal place of business at 12920 SE 38th Street, Bellevue, Washington 98006. It is the fourth largest United States provider of wireless services with approximately 33 million subscribers.

38. Each of the named Defendants sold Text Messaging Services in the United States directly or through its affiliates and/or subsidiaries after January 1, 2005.

39. Each Defendant acted as the agent or joint venturer of or for the other Defendants with respect

to the acts, violations and common course of conduct alleged herein.

CO-CONSPIRATORS

40. Various others, presently unknown to Plaintiffs, participated as co-conspirators in the violations alleged in this complaint and performed acts and made statements in furtherance thereof.

41. The acts charged in this complaint have been done by Defendants and their co-conspirators or were authorized, ordered or done by their respective officers, agents, employees, or representatives while actively engaged in the management of each Defendant's business or affairs.

CLASS ACTION ALLEGATIONS

42. Plaintiffs bring this action under Federal Rule of Civil Procedure 23(a), (b)(1)(A), (b)(2) and (b)(3) on behalf of themselves and the following Class:

> All persons and entities who paid a per-message price for Text Messaging Services in the United States directly to one or more of the Defendants or their affiliates or subsidiaries at any time from January 1, 2005 to the present. The Class excludes government entities, Defendants, and Defendants' parents, affiliates, subsidiaries, officers and directors.

43. Plaintiffs do not know the exact number of Class members because that information is within the exclusive control of Defendants, but believe that there are many millions geographically dispersed throughout the United States, such that joinder of all members would be impracticable.

44. The identities of Class members can be readily determined from records maintained by Defendants and their agents.

45. Questions of law or fact common to Class members exist and predominate over any questions affecting individual members of the Class, and include:

a. Whether Defendants engaged in a contract, combination or conspiracy to raise, fix, stabilize or maintain the per-message price for Text Messaging Services in the United States;

b. Whether each Defendant engaged in the contract, combination or conspiracy, and if so, to what extent;

c. Whether the contract, combination or conspiracy violates Section 1 of the Sherman Act;

d. Whether there were any additional co-conspirators to the contract, combination or conspiracy, and if so, their identities;

e. The duration and extent of the contract, combination or conspiracy;

f. Whether the conduct of Defendants and their co-conspirators caused the per-message price of Text Messaging Services to be artificially inflated to anti-competitive levels;

g. Whether Plaintiffs and Class members were injured by the conduct of Defendants and their co-conspirators;

h. The appropriate classwide measure of damages; and

i. Whether Plaintiffs and the Class are entitled to injunctive relief.

46. Plaintiffs have claims that are typical of the claims of the Class, have no interests adverse to or in conflict with the Class, and will fairly and adequately protect the interests of the Class.

47. Plaintiffs have retained counsel who are experienced in antitrust class actions, have significant knowledge about the antitrust laws, have performed considerable work in identifying and investigating the potential claims in this action, and have committed significant resources to representing the Class.

48. Separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

49. Defendants have acted on grounds that apply generally to the Class, so that final injunctive relief is appropriate for the Class as a whole.

50. Prosecuting the case as a class action is superior to any other methods for fair and efficient adjudication of the controversy because class members have no interest in individually controlling the prosecution of separate actions, as individual prosecutions would be uneconomic, would impose heavy burdens on the parties and the courts, and would create a risk of inconsistent adjudications. In addition, all litigation concerning this controversy already has been centralized in this forum, and it is unlikely that there will be any significant difficulties in managing this case as a class action.

TRADE AND COMMERCE

51. During the Class Period, Defendants and their co-conspirators sold a substantial amount of Text Messaging Services within the continuous and uninterrupted flow of interstate and foreign commerce, and as intended, their actions substantially affected that commerce.

52. The wireless telephone industry has undergone consolidation in the past four years, with the number of major national competitors declining from six to four.

53. Defendants are the four largest wireless telecommunications companies in the United States, and with more than 225 million subscribers, they control more than 90 percent of the Text Messaging Services sold in the United States.

54. Thus, together, Defendants have great power in the market for Text Messaging Services and are capable of combining to increase the market price for those services to supra-competitive levels.

TEXT MESSAGE SERVICES AND COSTS

55. Text messaging involves the use of cellular telephone equipment to send and receive short messages, generally limited to 160 characters per message.

56. Text messaging constitutes a relevant market, and there are no good substitutes for text messaging.

57. Customers sent 363 billion text messages in 2007, resulting in annual text messaging revenues of about $23.2 billion.

58. By 2008, Defendants transmitted 2.5 trillion text messages for almost 263 million wireless subscribers in the United States, representing 84% of the total population of the United States.

59. It is estimated that 3.3 trillion text messages will be sent in 2009.

60. AT&T has estimated that approximately two percent of the text messages sent and received on its system were purchased on a per-message basis, while approximately ten percent of T-Mobile's customers' text messaging is conducted on a per-message basis.

61. Assuming that at least two percent of the 2.5 trillion text messages that were sent and received in 2008 were purchased on a per-message basis, resulting in 50 billion text messages being sent and received at twenty cents each, Defendants' joint per-text-message revenue for the year 2008 alone would have been $10 billion.

62. While some subscribers purchase text messaging plans that allow them to send or receive a set or unlimited number of text messages for a flat monthly fee, many others pay an individual fee for each text message.

63. Defendants charge fees not only for outgoing messages, but also for incoming messages received by the subscriber, resulting in a fee being paid to a Defendant twice for each message – once when the message is sent, and once when it is received.

64. Text message files are exponentially smaller than voicemail, e-mail and music download files, and it thus costs exponentially less to transmit them.

65. For example, 600 text messages contain less data than one minute of a telephone call, making each text messaging file almost insignificant in the world of transmitting electronic data.

66. Defendants' cost to deliver an individual text message is close to zero because it is transmitted on an existing connection between a cell phone and the cell phone system.

67. Despite these minimal costs, carriers charge huge mark-ups and enjoy high profit margins on Text Messaging Services. According to technology news source CNET News: "One can easily assume that the mark-up on a text message *is several thousands*

times what it actually costs carriers to transmit this little bit of data." (Emphasis added.)

68. The benefits of competition are lower prices and better services, and with competition, per-unit prices should be closely related to and follow per-unit costs.

69. Theoretically and historically, as per-unit costs for an item substantially decrease, per unit prices for such item substantially decrease.

70. Between 2005 and late 2006 or early 2007, each Defendant's per-unit costs associated with text messages substantially decreased—by approximately 50%.

71. Absent collusion, Defendants' per-unit prices for text messages should have substantially decreased as well.

72. Defendants already had the infrastructure to transmit many more text messages than they were transmitting (and presently do transmit). Because the supply of text messages was considerably greater than consumers' demand for them, Defendants' prices for text messaging should have decreased. Increasing prices during a period of oversupply is one of the leading indicators of a conspiracy.

73. From 2005 to early 2007, the price of other wireless services provided by Defendants *decreased*. In fact, the same infrastructure that enables Defendants to transmit text messages enables them to transmit other wireless services. The factors that govern the decreasing costs of text messaging also govern the decreasing costs of those other wireless services. Defendants' prices for text messaging should have decreased between 2005 and late 2006 or early 2007.

74. However, Defendants' per-unit prices for text messages did not decrease over this period. In fact, no Defendant's price for per-unit text messaging decreased at all.

75. Prior to the conspiracy, Defendants actively competed for per-unit text messaging services and charged distinct prices. T-Mobile charged five cents for both outgoing and incoming text messages up through April 2006, when it raised its price to ten cents as part of the alleged conspiracy.

76. Alltel (later Verizon), in contrast, changed its per-unit pricing on several occasions, charging ten cents until the middle of 2005, then dropping its fee to five cents until the end of 2005, subsequently raising its fee to eight cents in January 2006, and finally reaching the ten cent agreed price in October 2006.

77. Verizon, which previously followed a unique pricing model, charged ten cents for its outgoing text messages up through the start of the conspiracy period, but charged only two cents for incoming messages. Verizon persisted in this independent pricing until agreeing to set its prices for both incoming and outgoing messages at ten cents as part of the conspiracy towards the end of 2006.

78. Cingular (later AT&T) never departed from its original price of ten cents, until such time as all Defendants raised their prices as part of the conspiracy.

79. Importantly, before the conspiracy, Nextel (now Sprint Nextel) first tried to increase the per-unit price from ten to fifteen cents in the 4th Quarter of 2003. The other wireless providers refused to follow Nextel's lead, and stood firm at their individual prices. In this competitive environment, Nextel

was forced to return its per-text rate to the earlier ten cents in the 1st Quarter of 2005.

80. The conspiracy began after this unsuccessful attempt to increase prices independently. In 2005 and 2006, the Defendants agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services. With Cingular charging ten cents per text, and Sprint Nextel having dropped its per-unit fee to an identical ten cent level, T-Mobile, Alltel, and Verizon joined them in charging an identical ten cents per-unit for all incoming and outgoing messages. Each Defendant engaged in the highly unusual conduct of aligning their per unit text messaging prices and then increasing them by identical amounts.

81. Indeed, each and every Defendant engaged in the exact same, highly anomalous behavior of doubling its per-unit text messaging prices in a span of barely over a year.

82. Specifically, by the end of 2006, as part of the conspiracy, each Defendant had aligned their per-unit fee at ten cents per each text message sent or received. In late 2006 and early 2007, each Defendant increased its per-message fee by 50%, from ten to fifteen cents as outlined in the following chart:

Defendant	Price Increase from 10¢ to 15¢
Sprint Nextel	4th Q 2006
Alltel	4th Q 2006
AT&T	1st Q 2007
Verizon Wireless	1st Q 2007
T-Mobile USA	2nd Q 2007

83. During 2007 and early 2008, the amount of text messages sent by each Defendant's customers greatly increased.

84. During this same period, the per-unit costs of text messages of each Defendant continued to decrease substantially, by at least 35%, and each Defendant's available supply to transmit text messages still far exceeded usage and demand. Also, during that period, each Defendant decreased its per-unit prices for other wireless services.

85. Moreover, each Defendant selected the exact same, extremely substantial 33.33% increase in its prices. Specifically, each Defendant increased its per-message fee from fifteen cents to twenty cents as outlined below:[5]

Defendant	Price Increase from 15¢ to 20¢
Sprint Nextel	4th Q 2007
AT&T	1st Q 2008
Verizon Wireless	1st Q 2008
T-Mobile USA	3rd Q 2008

86. Sprint Nextel was the ringleader in all price increases subsequent to the alignment of all per-unit prices at ten cents. In contrast to the independent conduct after Nextel first tried to increase its rates in 2003, the other Defendants adopted Sprint Nextel's per-text price increases in this instance as part of the conspiracy. Verizon and AT&T did so immediately, in the very next quarter for both increases, and

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[5] Verizon acquired Alltel prior to the increase from ten to fifteen cents, and is therefore not included in the chart.

T-Mobile ultimately cooperated and adopted the increase.

87. Compared to historical experience, economic theory, Defendants' own contemporaneous pricing of comparable products, Defendants' excess supply, and Defendants' low costs, the prices of text messaging services should have decreased substantially between 2005 and 2008. Moreover, the alignment and uniform increases evidenced above were a stark departure from Defendants' independent and competitive pricing practices in the preceding time period.

88. However, Defendants' collusive behavior subsequently caused a 100% increase in per-unit text messaging prices paid by Plaintiffs at the same times that each Defendant's comparable costs decreased by approximately 65%, Defendants' supply exceeded demand, and the prices of Defendants' related products decreased.

89. Text messaging per-unit pricing lends itself to collusion in many ways. This is, in part, because text messaging is a uniquely homogeneous form of wireless communication. The per-text-message price can easily be severed from other service charges, separately observed, and openly communicated among Defendants. Defendants, in fact, did systematically engage in a highly unusual degree of communication with one another and shared information during 2005 – 2008. *See infra.* Defendants' prices for text messaging are even available on the Internet.

90. Given the circumstances hereinafter and previously alleged, the dramatic, identical rise in the price of text messaging must have resulted from a price fixing conspiracy among the Defendants.

91. In the alternative, under the circumstances hereinafter and previously alleged, Defendant

Sprint-Nextel Corp.'s astonishing price increases constituted offers to the other Defendants to avoid engaging in competition and to extract supracompetitive prices many thousand times each Defendant's costs for text messaging services. The other Defendants accepted Sprint-Nextel's offers when they implemented identical price increases shortly thereafter, thereby consummating illegal agreements among suppliers representing 90% of the text message market to raise and maintain prices.

92. Under these circumstances, Defendants' pattern of offers and acceptances in and of itself constitutes a price fixing conspiracy.

OPPORTUNITY TO CONSPIRE THROUGH TRADE ORGANIZATIONS

93. CTIA-The Wireless Association ("CTIA") is a trade organization based in Washington, D.C. that claims to be an "international association for the wireless telecommunications industry, dedicated to expanding the wireless frontier."

94. Defendants are currently members of the CTIA. Defendants have met regularly through the CTIA's biannual conventions since 2002.

95. In 2001, AT&T launched the first inter-carrier text messaging service, which allowed users to send text messages to customers of other carriers.

96. Following on the heels of AT&T's launch, Defendants AT&T, Sprint Nextel and Verizon met through the CTIA on numerous occasions to discuss pricing and text messaging.

97. For example, shortly thereafter, in early 2002, under CTIA's guidance, the six major national carriers, including Defendants, announced that they had reached agreement on allowing each carrier's service

for text messaging to communicate with the others' service.

98. Based on its orchestration of the interoperability agreements in 2002, CTIA has been and remains the driving force behind organizing Defendants and exchanging information about text messaging in the United States.

99. In announcing the interoperability agreements and potential massive revenue to carriers, CTIA President and CEO Tom Wheeler was quoted as saying, "Text messages have not only given consumers a brand new way to communicate, it has also given wireless companies around the globe an important new revenue stream. Last year, the revenue generated by text messages was greater than Hollywood's combined box office receipts, according to the Mobile Data Association in the U.K."

100. The CTIA has expressed concerns that its collection of data could contribute to anti-competitive endeavors, but it has nonetheless continued to track competitive data, and has in fact increased its collection of information on texting.

101. The CTIA created a Wireless Internet Caucus ("WIC"), which is a "core community of CTIA member companies dedicated to growing a large and robust market at the convergence of wireless and Internet technologies, products and services" and that "seek[s] to build a shared vision of this market and an action plan to enable its rapid growth."

102. In February 26, 2002, the CTIA convened the WIC Leadership Council, which "comprises a critical mass of key industry decision makers who work together to create a shared market vision and unified approach to solving problems and challenges faced collectively growing the wireless data marketplace."

The Leadership Council was tasked with "launching an industry-wide initiative to address the hurdles that face the U.S. market in wireless data. . . ."[6]

103. The WIC Leadership Council consisted of "the dominant forces in wireless data," including "representatives from the top six wireless carriers (AT&T Wireless Services, Cingular Wireless [later AT&T], Nextel, Sprint PCS, Verizon Wireless and VoiceStream Wireless [later renamed T-Mobile])."[7] Participants in the WIC Leadership Council meetings included: Jim Straight, Vice President Wireless Data & Internet Services, Verizon Wireless; John Quzdepski, VP & GM, Sprintpcs.com, Sprint PCS; Andrew Willett, VP, Multimedia Services, AT&T Wireless Services; Carlton Hill, Executive Director Internet Service, Cingular Wireless; Greg Santoro, Vice President, Internet and Wireless Services, Nextel; and Michael Cote, VP Wireless Data Sales & Operations, VoiceStream Wireless [later renamed T-Mobile].

104. The Leadership Council's inaugural meeting in February 2002 was a day-long event in which "executives of the U.S. wireless data industry began mapping out the course for the delivery of high-quality wireless data services," and discussed impediments to success in a variety of areas, including "messaging" services, interoperability, and "billing."[8]

105. The CTIA's Vice President of Wireless Internet Development noted that because of the crucial moment in the development of the wireless data marketplace, "[t]he WIC Leadership Council members'

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[6] Feb. 26, 2002 CTIA Press Release, *supra*.

[7] *Id.*

[8] *Id.*

efforts to create *industry-wide solutions through* ***'co-opetition'*** *with each other*, can have a dramatic influence on the pace of that development."[9]

106. The CTIA further emphasized that "[a]ll ships rise [together] . . . . What's best for one company is not always best for the industry. The time has come to *serve the industry first*."[10]

107. The WIC Leadership Council convenes "bi-annual, face-to-face meetings . . . while conducting quarterly conference calls to keep apprised of the progress made."[11] Additionally, the Leadership Council prepared and disseminated thorough presentations providing detailed information regarding text messaging revenue, pricing, billing, and delivery. The data in these presentations was provided directly by Defendants. The WIC and its Leadership Council have operated throughout the class period.

108. The WIC also published the "WIC Manifesto," providing for a "commitment to work together to build a shared vision for the industry, and an action roadmap to make that vision a reality." The WIC Manifesto stated that the companies participating in the WIC would "work together to enlist the support and alignment of all key stakeholders in order to implement [win-win] solutions."[12]

109. The purpose of such joint efforts through the WIC was "to build a shared future in which we can all look forward to *profiting together*."[13]

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[9] March 5, 2003 CTIA Press Release, *supra* (emphasis added).

[10] Feb. 26, 2002 CTIA Press Release, *supra* (emphasis added).

[11] *Id.*

[12] WIC Manifesto, *supra*, at 1-2.

[13] *Id.* (emphasis added).

110. As part of the Manifesto, the WIC specifically established the "Messaging Action Team," led by one of Nextel's executives. The Messaging Action Team devoted itself to "support a common approach to . . . message delivery mechanisms, interconnection, billing and settlement." The Messaging Action Team was further designed to "propose billing principles for message transfer between 'message service providers.'"

111. The CTIA also formed a Mobile Advertising Metrics Action Team comprised of wireless carriers that work together to agree to minimum standards for reporting metrics, targeting information, advertising inventory and consumer privacy, and to monitor the progress of other industry organizations and collaborate where appropriate.

112. During the variety of CTIA and Messaging Action Team meetings and conversations, Defendants had numerous opportunities to conspire to set pricing for Text Messaging Services. Sprint Nextel announced a per-unit text message price increase within approximately a month after the mid-year meeting in 2006, and again within approximately a month after the mid-year meeting in 2007, and as described above, the other Defendants followed shortly thereafter with identical price increases.

ADDITIONAL JOINT CONDUCT

113. The CTIA, of which Defendants are members, established and controls the Common Short Code Association (CSCA). Defendants, working together through the CTIA, collusively use the CSCA to expand the market for texting services, control the prices for texting services, and generate further demand for texting services at the excessive prices established by the Defendants.

114. Common Short Codes ("CSCs") are five-digit or six-digit numeric codes to which text messages can be addressed from a wireless device. They are easy to remember, compatible across all participating carriers, and can be leased by anyone interested in interacting with over 200 million wireless consumers.

115. Wireless subscribers send text messages to Short Codes to access a wide variety of mobile content for delivery to their wireless devices, such as sweepstakes, tele-voting campaigns, mobile coupons, other promotions, and a wide range of additional interactive wireless services.

116. Marketers of consumer products and services, as well as business and enterprise customers, are currently using Short Codes to directly interact with and attract various audiences, as Short Codes provide an unprecedented opportunity to engage customers anytime, anywhere.

117. According to the CSCA, "The potential is enormous. Common Short Codes will enable the continued growth of text messaging and provide a platform upon which new technologies will be able to flourish. Market developments like picture messaging (or MMS) and the continued evolution of Instant Messaging into the wireless medium make text messaging one of the most exciting, yet simple, breakthroughs, since the advent of the telephone itself!"

118. The CSCA leases the Short Codes to advertisers, which then negotiate agreements with each carrier to carry their Short Codes.

119. The CSCA admits that its control of the Short Codes is a substantial benefit: "Wireless Service Providers benefits: Drives up text messaging usage and revenues because more applications will be funded."

120. Through the CSCA, CTIA has created the "shared vision" of the WIC by going beyond the bounds of a trade organization into the business of generating and driving profits for its members, including its core members, the named Defendants.

121. Short Codes earn money for the Defendants in a number of ways: the Defendants' trade association consortium charges a set fee for the establishment and leasing of Short Codes; then the lessee of the Short Code pays each carrier for the right to carry its codes; and consumers are then charged for using the Short Code, sometimes in multiple ways.

122. For example, Major League Baseball has leased the Short Code 65246 "MLBGO" at http://mobile.mlb.com/web, which provides the subscriber with sports alerts, Ringtones, and wallpaper. One of the options offered is "Team Alerts" where, for $3.99 "plus standard messaging fees," a subscriber can "stay connected" to his or her favorite team. The fan receives fifteen to twenty alerts per week, including game summaries, home runs, lead changes, breaking news, and video highlights. Major League Baseball says "To avoid high carrier data charges, an unlimited data plan is strongly recommended." Defendants receive a share of the monthly fee for alert systems and their charges for the services, and for these types of services and revenues, they need a large group of subscribing customers with unlimited data plans.

123. The Groupe Speciale Mobile Association ("GSMA") is a worldwide trade group of cellular providers that boasts membership of 750 mobile networks across 219 countries that collectively serve more than 3.4 billion customers totaling 85% of the world's mobile phone users.

124. One of the GSMA member-only databases includes information such as effective price per minute, total billed for SMS events, and number of SMS messages per user per month.

125. GSMA recently completed its annual "Mobile World Congress" that was attended by at least leaders from AT&T and Verizon Communication.

126. One of the break-out sessions at that "Congress" pertained to "Pricing Strategies for the Unlimited Generation."

127. Through CTIA and GSMA, the defendants have a forum in which to interact, access relevant utilization and pricing data, and participate in committees to lobby governmental entities, which furthers their collusive efforts.

128. The revenues of Defendants are dependent on encouraging individual users to use and become reliant upon high amounts of data.

129. Defendants, individually and acting in concert, have adopted uniform and unreasonably high charges for text messaging in order to encourage their customers to purchase other services.

130. Defendants stand to earn significant fees from the use of Short Codes, and if they are to fulfill their potential as a revenue driver, customers need to have unlimited text messaging and related data plans.

131. The larger the group of potential customers equipped with unlimited plans, the more fees Defendants can demand for the right to carry their short codes.

132. Consequently, it is necessary for Defendants to enroll as many customers as possible in unlimited data plans.

133. Defendants, acting jointly, in concert, and individually, also have adopted high single text only plans in order to encourage and force their texting customers to purchase unlimited data plans and other bundled services that the individual consumers may not want, need, or be able to afford.

CONGRESSIONAL INVESTIGATION

134. On September 9, 2008, the Senate Antitrust Subcommittee sent a letter to Defendants, questioning the basis for the huge increases in the pay-per-use text messaging price.

135. The Senate Subcommittee expressed concern about the increases being made at nearly the same time, in identical amounts, when price increases did not appear to be justified by increases in costs, and concluded that "[t]his conduct is hardly consistent with the vigorous price competition we hope to see in a competitive marketplace."

136. The Senate Subcommittee also requested that each Defendant:

a. explain the cost, technical or other factors that justify a 100% increase in the cost of Text Messaging Services from 2005 to 2008;

b. provide data on the use of Text Messaging Services from 2005 to 2008;

c. provide a comparison of prices charged for Text Messaging Services as compared to other services offered by the company such as prices per minute for voice calling, prices for sending emails, and prices charged for data services such as internet access over wireless devices from 2005 to the present; and

d. state whether the company's Text Messaging Services pricing structure differs in any significant respect from the pricing of the company's three main competitors.

137. In response, Defendants provided limited and biased information on the prices for their package plans, including their text message package plans, but failed to (a) specifically address why they increased their per-message prices for text messaging or (b) deny that those increases were the result of collusion.

STRUCTURAL FACTORS FACILITATE COLLUSION

138. The wireless telephone-provider industry is marked by certain structural and other characteristics that make price fixing feasible, including the heavy concentration of the market share among Defendants.

139. Price fixing is relatively easy to maintain in a market such as that for Text Messaging Services, which has extremely high barriers to entry because of the high cost of infrastructures, creating a situation where there is virtually no chance that a new competitor will enter the market to challenge artificially high prices.

140. Collusion among competitors in this market is also easy because Text Messaging Services are homogenous, with no discernable difference between the Text Messaging Services provided by one market participant over another.

141. Defendants have colluded on the inclusion of other terms in their cellular and text messaging contracts, in relation to early termination fees and mandatory arbitration clauses, leaving consumers with no choice but to accept these terms or forego purchasing cellular and text messaging services.

COMMON CLASS ARBITRATION WAIVERS

142. Defendants require that Plaintiffs and other Class Members agree to contracts which require wireless users to arbitrate disputes with service providers and to waive their right to class arbitration. These common waivers are indicative of additional collusive, anticompetitive conduct and are specifically designed to facilitate Defendants' conspiracy.

143. As Defendants know, due to the high cost of litigation and the comparatively small injury an individual user suffers from their conspiracy, it is only economically feasible for the individual to seek redress by joining a class action. Common class arbitration waivers constitute an attempt by Defendants to insulate themselves from legal challenge on a class-wide basis, enabling them to reap substantial profits from the collective injury they impose on users.

144. Plaintiffs and other Class Members who have submitted to class arbitration waivers have done so because it is extremely difficult to function in the current economic and social climate without Text Messaging and wireless services. In addition, such Plaintiffs and other Class Members have no bargaining power, do not understand the consequences of a class arbitration waiver, and may be unsophisticated. For the foregoing reasons, the class arbitration waiver is a classic contract of adhesion and is unconscionable and unenforceable.

145. Moreover, Defendants acknowledge that these class arbitration waivers are of questionable validity, as their contracts make provisions for what will happen when a court determines that the waivers are unenforceable or void. Under those circumstances, the contracts state that the overarching

agreement to arbitrate is itself void. As the class arbitration waivers at issue are unenforceable, and as the overarching agreements to arbitrate are consequently void pursuant to contract, Plaintiffs have properly brought this litigation in this Court on behalf of themselves and the Class.

VIOLATION OF SECTION 1 OF THE SHERMAN ACT

146. Plaintiffs re-allege paragraphs 1 through 145 as if fully restated herein.

147. Beginning at least as early as January 1, 2005 (the exact date being unknown to Plaintiffs) and continuing until the present, Defendants and their co-conspirators engaged in a contract, combination and conspiracy to artificially raise, fix, maintain and/or stabilize pricing for Text Messaging Services in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

148. Defendants entered into illicit agreements to increase prices of Text Messaging Services at some point prior to and during the period around July-December 2006 (for the increase implemented in Q4 2006-Q2 2007) and again at some point prior to and during the period around July-December 2007 (for the increase implemented in Q4 2007-Q3 2008).

149. For the purpose of formulating and carrying out the contract, combination and conspiracy, Defendants and their co-conspirators did those things which they conspired to do, as alleged above.

150. The contract, combination and conspiracy alleged had the following effects, among others:

a. purchasers of Text Messaging Services have been and continue to be deprived of the benefit of free and open competition;

b. the per text message price has been and continues to be fixed, raised, maintained and stabilized at artificially high and non-competitive levels; and

c. competition between and among Defendants and other co-conspirators in the sale of Text Messaging Services has been and continues to be unreasonably restrained.

151. Plaintiffs and the other Class members have been injured in their business and property by being unable to purchase text messages on a per-message basis, except at a price higher than otherwise would have been paid in the absence of Defendants' unlawful contract, combination and conspiracy.

152. The contract, combination, and conspiracy is continuing, and will continue unless the injunctive relief prayed for herein is granted.

153. Plaintiffs and the Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

A. That the Court determine that the Sherman Act claim may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure;

B. That the Court adjudge and decree that Defendants engaged in an unlawful contract, combination and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1);

C. That the Court adjudge and decree that each of the Defendants, its subsidiaries, successors, transferees, assigns, and respective officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from directly or indirectly continuing, maintaining or renewing the contract, combination and conspiracy alleged herein, and from engaging in any other contract, combination and conspiracy, agreement, understanding or concert of action having a similar purpose or effect;

D. That Plaintiffs and the other Class Members recover threefold the damages that each sustained;

E. That Plaintiffs and the other Class Members recover the costs of the suit, including reasonable attorneys' and expert fees and costs;

F. That Plaintiffs and the other Class Members be awarded pre judgment and post-judgment interest at the highest legal rate from and after the date of service of the initial complaints to the extent provided by law; and

G. That the Court grant such other, further or different relief as may be just.

JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury for all issues so triable.

Dated: May 4, 2010

Respectfully submitted,

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Plaintiffs' Steering Committee

No. _______

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: TEXT MESSAGING ANTITRUST LITIGATION

On Petition for Interlocutory Appeal from an
Order of the United States District Court
for the Northern District of Illinois

MDL No. 1997, Case No. 08 C 7082

PETITION FOR INTERLOCUTORY APPEAL

[Filed Nov. 2, 2010]

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B. The District Court's Decision Is Contestable

The district court's determination that the SAC states a claim stands in sharp tension with the district court's decision to grant defendants' motion to dismiss the initial complaint, as well as numerous district court decisions dismissing comparable complaints. In its decision dismissing the initial complaint, the district court discussed plaintiffs' allegations of marketplace context at length and found them insufficient. First, the fact that none of the defendants had attempted to attract customers by reducing its rate for single-use text messages did not support any inference of agreement, given plaintiffs' allegation that the wireless services industry is concentrated, *see* SAC ¶ 138, and that "'follow-the-leader'" pricing is consistent with unilateral conduct in such industries. *Text Messaging Antitrust Litig.*, 2009 WL 5066652, at *8 (quoting *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992)). Second, the district court found that the price changes alleged in the complaint were neither "'complex'" nor "'historically unprecedented,'" nor did they occur "'at the very same time,'" *Id.* (quoting *Twombly*, 550 U.S. at 557 n.4). Furthermore, there was an "obvious alternative explanation" for the increases in pay-per-single-use fees, which plaintiffs acknowledged in their complaint, *see* SAC ¶ 133 – that is, defendants' wish to "encourage consumers to purchase text messaging services as part of a bundled plan." 2009 WL 5066652, at *9 (internal quotation marks omitted). Third, plaintiffs' allegations regarding the industry's "excess capacity" did not support an inference of conspiracy because plaintiffs failed to make any allegations regarding overall wireless services industry capacity – as opposed to capacity for text messaging in particular – and, moreover, conceded that defendants' general wireless service prices have actually declined. *See id.* at *9-*10. Fourth, the complaint "identif[ied] several reasons why defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.'" *Id.* at *10 (quoting *Iqbal*, 129 S. Ct. at 1950).

The district court did not suggest that any new allegations in the SAC affected its conclusion that plaintiffs' allegations of marketplace context did not support an inference of agreement. Instead, the district court focused on the SAC's additional allegations regarding defendants' trade association activities, finding those allegations – along with plaintiffs' more explicit allegation that the conspiracy began when all defendants converged on $0.10 per text message – were sufficient to state a "claim of an express agreement." 2010 WL 1782006, at *2.[9] The district court focused in particular on allegations that "defendants exchanged pricing information"; the allegation that the trade association was "narrowly focused on text messaging delivery and pricing"; statements that the trade association encouraged "co-opetition" and "plac[ed] the interests of the industry above and before the individual companies' individual interests"; and allegations "identifying the participants in the meetings and the dates (or approximate dates) of the meetings." *Id.* at *2-*3 (internal quotation marks and emphasis omitted).

Plaintiffs' bald and conclusory allegations that trade association meetings were used to fix prices are no different from the types of allegations that have been held inadequate by courts of appeals and district courts around the country. *See, e.g., In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (per curiam); *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 147-48

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[9] In its earlier decision, the district court concluded that plaintiffs' allegation that defendants participated in trade associations was insufficient because plaintiffs had not made any "allegations about particular meetings at which they contend any of the defendants reached an agreement." *Text Messaging Antitrust Litig.*, 2009 WL 5066652, at *6. "They offer no statements by any of the defendants suggesting the presence of an agreement." *Id.* "Nor do they give any indication of the terms of the alleged agreement." *Id.*

(E.D.N.Y. 2010); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257 (W.D. Wash. 2009); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963 (N.D. Cal. 2007). Each of these cases involved allegations that the defendants had conspired through trade associations. In all of them, in the absence of allegations connecting the content of specific trade association meetings to particular instances of conspiratorial conduct, courts have heeded the admonition of the Supreme Court in *Twombly* that allegations of trade association activity cannot add sufficient factual heft to support an otherwise insufficient conspiracy allegation. *See* 550 U.S. at 567 n.12.

Here, plaintiffs' allegations do nothing to tie defendants' alleged trade association activity to any alleged price-fixing agreement. Plaintiffs relied on public statements from several years *before* any price change that could have been the result of any alleged agreement; furthermore, those statements did not refer implicitly or explicitly to any agreement regarding price (as opposed to pro-competitive steps to ensure that text messages could be sent among carriers' varying technical platforms). As reflected on the face of the documents attached to the SAC, each of the alleged meetings provided an open forum for participants from a range of companies – including wireless carriers, software and applications providers, and handset manufacturers – and thus no special opportunity for clandestine agreement among defendants. As for the generic claim that defendants exchanged pricing data, the prior complaint contained the same allegation. *See* Corrected Consol. Class Action Compl. ¶ 86 (alleging that defendants "met through the CTIA on numerous occasions to discuss pricing and text messaging"); *see also id.* ¶ 90 (alleging that CTIA "continued to track competitive data, and has in fact increased its collection of information on texting"). Thus, the new allegations do not provide the heft plaintiffs require to plead adequately their claim. At a minimum, as the district court conceded in granting defendants' motion to certify its decision for interlocutory appeal, there are grounds for substantial differences of opinion on whether the new allegations in the SAC suffice to make out a claim.

* * * * *